

No. 15022

United States
Court of Appeals
for the Ninth Circuit

J. P. TONKOFF, individually and as trustee,
Appellant,

vs.

CLAY BARR and BETTY BARR, husband and
wife, Appellees.

Transcript of Record

In Two Volumes

VOLUME TWO

(Pages 273 to 548, inclusive)

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District of Oregon.

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(Testimony of Clay Barr.)

Q. You were there from August 8th until you started harvesting on September the 8th, was it?

A. Yes, we started harvesting on there. I wasn't there all the time, but the biggest share of the time. I made a trip to Denver. That took me four or five days. I went to my landlord's over there.

Q. Where else did you go?

A. I was back up to Spokane. [238]

Q. How long were you gone in Spokane?

A. That was the time I gave notice to you of the approximate starting date of the harvest.

Q. What did you have to go to Spokane for? For Herman to write that letter for you?

A. No, I had a public accountant write the letter.

Q. How long did it take you to go to Spokane?

A. Oh, I was probably gone maybe three days. I am just guessing.

Q. Where else did you go?

A. I made one trip to Sacramento.

Q. How long did that take you?

A. I went down one day and came back the next.

Q. That is ten days out of thirty. Where else did you go?

A. I think I made one more trip back up to the ranch in Northern Oregon in that time.

Q. How long did you stay there?

A. Oh, I think I went up one evening and stayed there that day and then came back the next day.

Q. That is twelve days out of thirty. Where else did you go?

(Testimony of Clay Barr.)

A. I didn't go any other place.

Q. The rest of the time you spent on this ranch?

A. Yes, most of the time.

Q. What were you doing?

A. What? [239]

Q. What were you doing?

A. Well, we was just getting ready for harvest, preparing the combines, fixing up the bins and the motors, you know, and the trucks. We made one trip back up when we hauled in this self-propelled machine.

Q. Incidentally, Mr. Barr, there is about \$150,000 worth of equipment on this ranch, isn't there, or there was when you took over there?

A. The evaluation of used equipment, why, you will have to estimate the valuation. I wouldn't want to.

Q. You did have the kind of equipment to do with and to farm this property with, didn't you?

A. I quoted most of it out there on the place. And that was all that I was required to use under my lease, but in my opinion, to get it done in proper time on a late season, I needed more so I hauled in more.

Q. What did you sell your lease for to the Farnham boys?

A. I just quoted it to you there. By not getting this \$15,000 there was a question of whether I would have adequate expenses for the coming year to operate properly or not, so I sold it to them.

Q. I say, what did you sell it for, what price?

(Testimony of Clay Barr.)

A. Oh, for what price?

Q. Yes. A. I got \$21,000, I think it was.

Q. You had it up for \$50,000, didn't you, for awhile? A. What?

Q. You had it up for sale for \$50,000, didn't you, this lease?

A. I never had it up for sale for \$50,000.

Q. What has this \$15,000 got to do with it? Has it got anything to do with the sale to the Farnham boys?

A. No. That was just supposed to take care of the harvest which I didn't get back.

Q. Now the Farnham boys lived up there in your part of the country, up north, didn't they?

A. The one boy was in the service at that time, and the other boy was farming, oh, out of Steptoe, a little town in the Palouse country up there.

Q. Incidentally, do they owe you any money on the purchase of this lease? A. No.

Q. They paid it up?

A. Yes, they don't owe me anything.

Q. Did you operate any of the machinery on the ranch, Mr. Barr?

A. Meaning through the harvest, or anything?

Q. Yes.

A. No, my job—yes, I operated on odd jobs. I would go out there, you know, in the spring of the year when we was seeding there, you know—oh, one man got the toothache and [241] had to go to town to have his tooth pulled and I would fill in their jobs, take over, when one would be wanting to do

(Testimony of Clay Barr.)

something else a little bit, or just things like that. I never took a steady job at all. There was too much to do running around and looking after these machines to see that they was threshing properly.

Q. What relatives did you have down there?

A. What?

Q. What relatives did you have operating the machines?

A. Relatives?

Q. Yes.

A. My father-in-law was operating one machine, and I had two—I guess they would be second cousins, I guess.

Q. Those were the 18-year-olds?

A. There wasn't any 18-year-old boys there.

Q. How old were they?

A. You ask them when they get up here. I don't know just how old they are.

Q. They were under 20, anyway?

A. No. Let's see. I can tell you exactly what one boy is. He is 26 now, and that was two years ago, so he would be 24 at that time. But I don't know the other boy's age.

Q. Mr. Barr, you are experienced as a farmer, and you know that unless barley gets the proper amount of moisture it is not going to weigh up and it is not going to be brewing barley; [242] that is right, isn't it?

A. How did you have that worded, now?

Q. I said, as an experienced farmer—you say you are one of the best—you know that unless you have a sufficient amount of moisture to grow barley

(Testimony of Clay Barr.)

it will not go as brewing barley because it won't fill out and won't have the weight?

A. That is right, yes. But I think most of this made weight, didn't it?

Q. What?

A. I say, it is my understanding that most of that barley made weight, did it not?

Q. Not according to this computation sheet, it didn't. And that is one of the reasons why it didn't make brewing barley, is for the reason that it didn't have enough moisture to fill out?

A. That is your guess.

Q. I am asking you. I am not guessing. You are the expert farmer.

A. Well, there could be several reasons.

Q. What other reasons?

A. There is always a gamble when you are raising grain. It is one of the biggest gambles there is. You can get too much moisture in it, you can shrivel your growth of your stalk, making a thin, measly stalk, and it won't produce. You can get frost; you can dry out—there is several conditions [243] that can affect a crop. You are partially right on part of it, but that is not the only reason.

Q. The grain that you say was planted in the area where the ground was cracked didn't get enough moisture, did it? A. No.

Q. That is because you didn't put the water on?

A. Oh, the cracks in the ground wasn't due from lack of moisture.

Q. They weren't?

(Testimony of Clay Barr.)

A. It was due from improper cultivation. If you had plowed that ground six or eight inches deep and cultivated it properly, made a seed bed and put a mulch there, it wouldn't have cracked there. You would have conserved the natural moisture that was on the place, and also killed out the wild oats. There was more wild oats than tame.

Q. It is your testimony, Mr. Barr, that you didn't know when your father bought out Mr. Herman for \$7,500?

A. No, I didn't when he bought it, until after he bought it.

Q. Your father knew about this whole business, didn't he?

A. Speaking of what, now?

Q. Well, about the assignment. He was at Spokane when you were being sued up there on that fraud case, wasn't he?

A. He came in there and sat on the trial one day.

Q. He knew about what you had done, assigned the crop, and so on? [244]

A. No, he didn't know I had assigned it.

Q. He didn't know that?

A. No, I didn't tell him that. After it was all over with he did.

Q. He knew it before he bought out Herman?

A. Well, after I had assigned it to you I told him, but before I didn't ask his advice or tell him or anything else.

Q. You expected to get more money out of this

(Testimony of Clay Barr.)

crop down here, didn't you, Mr. Barr, after we were paid off? A. That \$15,000.

Q. Other than that didn't you expect to get anything?

A. I wasn't expecting to get anything.

Q. That is one of the reasons why you didn't go down there and farm it, isn't it?

A. Absolutely not.

Q. Because you knew——

A. That ranch was farmed.

Q. Because this assignment provided you were to get your \$15,000 first to pay for harvesting; isn't that right? A. Yes.

Q. You say it cost you \$16,000 to harvest this small crop on there? A. Approximately.

Q. With your relatives running the machines?

A. Approximately. Running like that my expenses from [245] June 10th until October the 19th, until I moved away there, was just a few dollars over \$16,000, from June 10th, the time you took the assignment.

Q. How could you spend that much money down there?

A. I can show you my tax returns on that thing there of the year's expenses.

Q. Incidentally, you were not paying Stevenson, were you? A. Yes.

Q. How much were you paying him?

A. I paid him \$500 a month. Mr. Kester there, I think, has got the check in his hand there now made to Mr. Stevenson.

(Testimony of Clay Barr.)

Q. Your testimony is you were paying Bud Stevenson \$500 a month?

A. From the time I took over until he was relieved of his job.

Q. And that Hofues was not paying him?

A. He was paying me—he was taking care of everything up to that date. Mr. Hofues and Mr. Kirschmer was paying everything up to that date. I was to stand the monthly payments to him and they was to take care of the percentage end.

Q. What is the total amount of money you paid Stevenson?

A. Ask Mr. Kester there. It is twenty-four hundred and some odd dollars.

Mr. Kester: Do you want to see the check?

Mr. Tonkoff: We have a photostatic copy of it.

Mr. Kester: Do you want to offer it?

Mr. Tonkoff: Yes, let's offer it in evidence. This check is dated September 30, 1953.

The Court: Admitted.

(The check referred to, dated September 30, 1953, in the amount of \$2,438.37, was marked and received in evidence as Plaintiff's Exhibit 15.)

Mr. Tonkoff: Q. Is this the total amount that you have paid?

A. Yes, that is the total amount I paid Mr. Stevenson.

Q. When did you start paying that \$500 a month? A. How is that?

Q. You started paying in May, didn't you?

(Testimony of Clay Barr.)

A. That would be a short month, in May. We had to divide the month of May there. We estimated it there, the division. We didn't figure it to the day. We were just taking a rough figure on it.

The Court: Recess for ten minutes.

(Short recess.)

Mr. Tonkoff: Q. Mr. Barr, isn't it a fact that you sold your lease to Farnham brothers for \$35,000?

A. \$35,000? You asked me what I received from the sale.

Q. Oh, that is not what I asked you at all. I asked you what you sold it for. [247]

A. To break that down, it was sold through a real estate man. He sold it for \$35,000. He got \$5,000, and I agreed to leave seed on the place for their next year's seeding, and later he come back and knocked off \$9,000 for the seed that was on there, and I received \$21,000.

Q. Mr. Barr, wasn't it provided by your sale that you were to receive \$35,000, payable \$1,000 upon the execution of your agreement, which was dated the 25th day of August, 1953, and the sum of \$19,000 on or before the 15th of September, 1953, and the balance of \$15,000 evidenced by three promissory notes, totaling \$35,000?

A. I think that is the way the agreement reads.

Q. Will you examine this and tell me whether or not this is the agreement that you had with Farnham brothers? That is the agreement, isn't it?

A. That is the agreement.

(Testimony of Clay Barr.)

Mr. Tonkoff: I offer that in evidence, your Honor.

The Court: Admitted.

(The agreement referred to, dated August 25, 1953, was received in evidence and marked Plaintiff's Exhibit 16.)

Mr. Tonkoff: Q. Now Mr. Kirschmer also asked you to irrigate, didn't he? He called you on the phone and told you to start irrigating?

A. Kirschmer never personally asked me to irrigate. [248]

Q. Did he ever ask any of your men?

A. The only time that was brought up was at the time that I took over the lease, and the irrigation was concerned there, and there was a question of whether they would have water enough at that time. They was afraid they wouldn't, so they was drilling a new well, and that turned out to be dry. And he told me to not use the well water or the canal water or to interfere with the potato and the pasture men, because that might get them into trouble; if I wanted to do some irrigating to use the lake water.

Q. There was plenty of water for irrigation that season because you said it was spilling over the dike, didn't you? A. Lake water.

Q. Yes. You heard Kirschmer testify, didn't you, down in Amarillo? You were there when your counsel took his deposition?

A. Yes, I was there.

(Testimony of Clay Barr.)

Q. Do you remember when he was asked this question:

“Question: And at that time did he tell you that Mr. Barr had promised to come down in a day or two and start the irrigation?”

This is my cross examination. And he answered:

“Answer: No, he didn't. He said that—he called me and told me that it should be irrigated. I said, ‘Well, I will call Clay,’ and I did.”

A. I called him on the irrigation after you was down there. [249]

Q. After I was down where?

A. After you was down there on July the 2nd or 3rd or 4th, along there, and told him that you was insisting on a little irrigation there. I told him that I was going to experiment on doing a little and see how it worked out.

Q. You didn't do it for two or three weeks, though, did you?

A. There was irrigation done there. I was back down there between the 12th and the 15th with an extra man, and there was irrigation had been done before I got there.

Q. Anyway, did Mr. Kirschmer call you or didn't he concerning the irrigation?

A. No, I called him.

Q. Do you remember him saying in his deposition at Amarillo that he did?

A. That he called me?

Q. Yes.

A. Well, he may have stated that.

(Testimony of Clay Barr.)

Q. Now, were the weeds always ahead of the grain down there, Mr. Barr?

A. Yes, the weeds was always a prominent factor over the grain for the simple reason under the poor conditions that arose there, the wet weather holds your grain back and makes a spindly, thin crop, turns it yellow-looking. It don't kill it completely out, but if it gets bad enough there it will. Lots of it did there. And the weeds will come along, and it is always a hardier crop than your grain. [250]

Q. Then there was no necessity for spraying?

A. There was some decent grain. That is what I was after, I was trying to see whether I could spray out what weeds there was to improve what grain there was.

Q. But by July it was too late to spray, wasn't it?

A. That is what the spray man said.

Q. Had you been down there prior to that time and called him it might have been a different situation, mightn't it?

A. I was just going on my own judgment. If the grain was so sick I was positive you couldn't spray until it had about three weeks of good sunshiny weather there to perk it up a little bit.

Q. Now Mr. Barr, do you remember when we were negotiating this settlement in Spokane you at one time offered to pay Mr. Charpentier and Judge Cramer a total of \$15,000.

A. Offered to pay who?

(Testimony of Clay Barr.)

Q. Mr. Charpentier and Judge Cramer, and we rejected that, didn't we?

A. I have no recollection of it.

Q. At any rate, we did agree on \$20,000 instead of ten or fifteen, didn't we?

A. I have no recollection of any dollar figures ever being mentioned in any settlement up there to me. It wasn't mentioned. [251]

Q. Mr. Barr, do you have any recollection of where your own lawyer told you that he wanted to get in on this too and put in \$10,000 for his services rendered to you?

A. When you had made your agreement of the dollar figures, how you was going to divide it, whether he did it or you did or your clients did it, that was the first dollar figures that came to me. After you had agreed to take it there was dollar figures.

Q. Do you recollect the time we spent half a day negotiating over offers and counteroffers down in the Davenport Hotel?

A. I was never in the Davenport Hotel at the time that was going on. That was you and Mr. Herman.

Q. You talked to your lawyer on several occasions before this was finally arrived at and the agreement consummated?

A. The only time I talked to him was—it was my offer to assign my interest in that crop, subject to the harvesting expenses, and he wanted to know what they was, and I just took a guess at

(Testimony of Clay Barr.)

them and said \$15,000. And I didn't miss it far. And he went to you, and when he come back it was all settled except the fact I wanted a rebate from the real estate man.

Q. You knew, didn't you, that nobody knew about your ownership of this leasehold interest down there at that time? We didn't know about it until you told us? You knew that, didn't you? [252]

A. I don't know whether you knew it or not.

Q. You just had gone into it on May 11th, and you remained down on the ranch until you went up to Spokane. You knew that nobody knew about your leasing this ranch, didn't you?

A. That is hard to say.

Q. You say you made no representations as to what this crop would bring?

A. In dollar figures, no.

Q. Did you make any as to the quantity of grain that it would produce?

A. No, I was quoting what I thought of the acres. My representation was approximately 2800 acres of ground, and which I knew that your man knew the ranch probably as well as I did. And I told Mr. Herman that I would give my half interest of that for a complete settlement of the case, just like I quoted.

Q. Did you make any representations as to the amount planted? A. The acreage?

Q. Yes.

A. Yes, to him. Not to you. I never talked this to you.

(Testimony of Clay Barr.)

Q. You signed this document, didn't you?

A. Sure. You wasn't present.

Q. You were present and so was your wife?

A. You wasn't present.

Q. I wasn't present? [253]

A. Not when I signed that document.

Q. You and your wife came to Ennis & Herman's office, did you not, in the Paulsen Building, didn't you?

A. And all your signatures was on it.

Mr. Tonkoff: I think that is all.

Redirect Examination

By Mr. Kester:

Q. Clay, Mr. Tonkoff has referred to this lawsuit in Spokane as being a fraud case against you. Will you just explain what that case was and how it came about and what it was all about.

The Court: I don't want to hear any more about that case. It is of no importance to me.

Mr. Kester: That is my position, but I just didn't want to let it go.

The Court: We are going to have to run over-time. I have to get into another case.

Mr. Kester: Q. When you were down there with Mr. Tonkoff somewhere around the 2nd or 3rd of July, and went back to Mikkalo and returned on about the 12th or 15th of July, during that time had you left any word with Bud Stevenson as to what you would like done in the way of work with the water?

(Testimony of Clay Barr.)

A. Oh, yes. I called to him and asked him if he would take the dragline and clean out the ditch so the water could get to that pump, and he did, and he started the pump there. And my man then was working there during that time putting water out on part of the ground.

Q. That is while you were gone?

A. That is while I was gone, yes.

Q. Now this agreement with the Farnham brothers on the assignment of your lease to them, counsel put in evidence the assignment which I showed him. Would you explain the difference between the way the contract was drawn and the way the thing ultimately worked out.

A. The contract called for \$35,000 payment over so many payments of so much money there—I forget the figures there—of which the real estate man out of it took \$5,000. And it also called for me to leave seed grain on the place.

The Court: I don't see what that has to do with this case, either.

Mr. Kester: Perhaps it doesn't, your Honor, but counsel went into it.

The Court: I am going to start clamping down now and hold this thing in closer limits.

Mr. Kester: There is this point involved, your Honor. I think we can make it short.

Q. Why didn't you leave the seed grain on the place as you had agreed to with the Farnhams?

A. Because I had assigned it over to them, and it would have been up to me to buy it out from

(Testimony of Clay Barr.)

Mr. Tonkoff and Mr. Herman, and I figured it was easier to settle the price of the grain with the Farnham boys than it was with them.

Q. By "them" you mean Tonkoff?

A. Mr. Tonkoff and Mr. Herman.

Mr. Kester: Now, will counsel stipulate that he wrote a letter on October 26th to Kerr-Gifford Co., of which I have shown him a copy here?

Mr. Tonkoff: Yes, if that is my letter I will do so.

Mr. Kester: Will you mark it and we will offer it in evidence.

The Court: Admitted.

(Copy of letter dated October 26, 1953, J. P. Tonkoff to Kerr-Gifford Co., was received in evidence and marked Defendants' Exhibit 17.)

Mr. Kester: Will you also mark this?

Mr. Tonkoff: The second one is the assignment, is it?

Mr. Kester: Yes, the notice of assignment.

The Court: Admitted.

(Copy of letter dated October 12, 1953, Clay Barr to Kerr-Gifford & Co., was received in evidence and marked Defendants' Exhibit 18.)

Mr. Kester: Exhibit 17, your Honor, is the demand by Mr. Tonkoff to Kerr-Gifford that they pay the trustee the entire 50 per cent, including the \$15,000 reserved.

Would you show Exhibit No. 18 to Mr. Barr, please?

(Testimony of Clay Barr.)

Mr. Tonkoff: I will stipulate with you that is the notice of assignment, to save some time.

Mr. Kester: Q. That notice of assignment which you have there was given to Kerr-Gifford on the date it bears there, October the 12th, was it?

A. Yes. It was made and signed that day and dropped in the mail. They received it a day or two afterwards.

Mr. Kester: That is all we have, your Honor.

Recross Examination

By Mr. Tonkoff:

Q. One more question. Did you sell all the grain off this property, Mr. Barr?

A. Off what property?

Q. The Meiss ranch.

A. No, you sold it, or you had Mr. Welch sell it.

Q. You mentioned a while ago that you gave the Farnham boys some wheat off of that property.

A. No, I didn't. I said that my agreement called for me to leave seed grain there, but in order to leave it there I would have had to have went and bought it back from you, and I figured it was easier to settle the price of the grain with them than it was with you. [257]

Mr. Tonkoff: That is all.

Redirect Examination

By Mr. Kester:

Q. One more thing, Clay. Did Hofues and

(Testimony of Clay Barr.)

Kirschmer ever complain to you about the way the ranch was farmed during 1953? A. No.

Mr. Kester: That is all.

Recross Examination

By Mr. Tonkoff:

Q. As a matter of fact, Hofues and Kirschmer were never on the ranch but once during the whole year, were they?

A. I won't say how many times they was out there. Kirschmer was out there twice, as I know of.

Q. That was before the crop was growing and coming out of the ground?

A. Kirschmer was out there three times, come to think of it.

Mr. Tonkoff: That is all, your Honor.

Mr. Kester: That is all.

(Witness excused) [258]

RALPH SMITH

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Smith?

A. Granger, Washington.

Q. What is your occupation?

A. I am foreman of a sheep feeding yard.

(Testimony of Ralph Smith.)

Q. What has been the nature of your work most of your life? A. Farming.

Q. Did you work on the Meiss ranch during the summer of 1953? A. I did.

Q. Where had you been working immediately prior to that time?

A. For Mr. Barr at Mikkalo, Oregon.

Q. When did you come down to the Meiss ranch?

A. About the 8th of August.

Q. Did you come down for the harvest?

A. I did.

Q. Had you helped complete the harvest at Mikkalo before going down there?

A. That is right.

Q. What did you find when you got to the Meiss ranch at that time with respect to the condition of the grain as to whether it was ready for harvest or not? [259]

A. At that time the grain was not ready for harvest.

Q. What did you do then while you were waiting?

A. During the interval between the time I got there and the time we started harvesting I helped overhaul the machinery and trucks.

Q. About when did the harvest start there?

A. Well, that I don't remember for sure, but I would say around the 10th of September.

Q. Did you help bring down some of the extra equipment from the Oregon ranch?

(Testimony of Ralph Smith.)

A. I did.

Q. What did you do?

A. I drove the truck that hauled the combine from the Oregon ranch.

Q. Was that a combine that had been used on Clay's Oregon harvest just immediately before that?

A. That is right.

Q. Now did you work then in the harvest on the Meiss ranch?

A. Did I what?

Q. Did you work in the harvest?

A. That is right.

Q. What was your job?

A. My primary job was weighmaster and truck driver.

Q. Weighmaster at the scales in Macdoel?

A. Right. [260]

Q. How much truck driving did you do?

A. Well, I just did substitute truck driving whenever there was a loaded truck that needed to go to town.

Q. When you went into town in the morning to take over the scales did you take a truckload along with you?

A. At times I did, yes.

Q. Did you travel the road between the ranch and the railroad track every day?

A. Every day that we hauled grain down I did travel the road.

Q. Did you observe any unusual amount of grain spilled along the roadway?

A. Only on one instance.

Q. What was that?

(Testimony of Ralph Smith.)

A. That was the case of the tailgate coming open.

Q. Who had that experience?

A. I did.

Q. What happened?

A. Well, as I remember—I don't remember how the tailgate of the tractor was built at this time, but the tailgate jiggled open on the rough road, and about a fourth of a load of grain spilled.

Q. Could you estimate about how much that was?

A. I would say not over two ton.

Q. What kind of grain, do you remember?

A. It was barley. [261]

Q. About when was this in the harvest time?

A. Well, I believe that is was about the middle of the harvest.

Q. Did that grain that was spilled out lay along the road there for awhile? A. That is right.

Q. Up to that time had there been any grain lying along the road there?

A. Not so you could see.

Q. Were you able to salvage any of that grain?

A. No, sir.

Q. Over what distance was it scattered?

A. I would say around two and a half to three miles.

Q. Were you aware of losing grain as you were driving into town? Did you realize it was spilling out? A. No, sir.

Q. Did you have occasion to be out in the harvest field yourself?

(Testimony of Ralph Smith.)

A. Only on occasions of going out after a truck, or one of the boys wanting some help, or something of that sort.

Q. Your job as weighmaster there was to check the grain out at the railroad?

A. That is correct.

Q. Did Kerr-Gifford & Co. have a man there also?

A. There was a Kerr-Gifford man there some-time during every day, I believe. [262]

Q. What did he do?

A. He sampled the cars and billed the cars.

Q. How long did you stay there then?

A. I left the Meiss ranch on October 16th.

Q. Where did you go?

A. I went back to the Harvey Barr residence at Lacrosse, Washington.

Q. Did you work then for Harvey Barr?

A. No, I didn't.

Mr. Kester: I think that is all.

Cross Examination

By Mr. Fertig:

Q. What is your present occupation?

A. I am foreman of a sheep operation at Granger, Washington.

Q. You say you have been a farmer how long?

A. All my life.

Q. How long is that?

A. Well, I was born and raised on a ranch, and I am 29 years old.

(Testimony of Ralph Smith.)

Q. Where is the ranch you were born and raised on? A. Cheney, Washington.

Q. Are farming conditions up there the same as they would be down in the Klamath Falls area?

A. I would say they were not.

Q. Now before August 8th had you ever been on that ranch? A. No, sir.

Q. You don't know anything about how the crops were growing or anything else, do you?

A. No, sir.

Q. When you did get down there your job was principally that of weighmaster in town?

A. That is right.

Q. So you don't know anything about how the crops were harvested or anything else, do you?

A. I wouldn't say that I didn't know how they were harvested.

Q. Were you there and observed them harvesting them?

A. The first part of the harvest I drove truck from the field, and then I was there and watched the machines. I helped regulate the machines.

Q. You worked on the machines?

A. I only helped. Maybe I would advise the other fellows.

Q. You were there from August 8th to October 16th; is that right? A. That is correct.

Q. What period of that time did Mr. Clay Barr spend there?

A. I would say that I saw Mr. Clay Barr nearly every day.

(Testimony of Ralph Smith.)

Q. He didn't leave?

A. I wouldn't say that he didn't leave. I don't know that he did. [264]

Q. You say you saw him nearly every day. Did he or did he not leave during periods of that time?

A. I don't know what Mr. Barr did at times that I didn't see him.

Q. Did he leave for a period of two or three days then?

A. That I don't remember.

Q. Did he leave for a period of two or three days on several occasions?

A. That I don't remember, either.

Q. But you remember seeing him every day?

A. I didn't say I remember seeing him every day. I said I saw him nearly every day.

Q. So he could have been gone periods of time too, couldn't he?

A. He could have been gone a day, right, or two days.

Q. You say that after you left there you went—you had been working for Clay Barr before; is that it?

A. That is right.

Q. And then you went to work for Harvey Barr?

A. No, I didn't say I went to work for Harvey Barr.

Q. Did you go to his home?

A. I went to his home.

Q. Are you related to him, or something?

A. No, sir. [265]

(Testimony of Ralph Smith.)

Q. Did you live with him? A. No, sir.

Q. You just went there to visit?

A. Went there to visit.

Q. I see. You have been friends with the Barrs a long time? A. I have.

Q. How long?

A. I would say for around seven years.

Q. Now, how long had you worked for Clay Barr before August 8th?

A. I believe about a month.

Q. Is that the only time you had ever worked for him? A. That is right.

Q. Now, as weighmaster your duties are confined down where the scales are?

A. I wouldn't necessarily say that, either, because we didn't always haul to town.

Q. Now, you said that you didn't observe an unusual amount of grain on the highway as you would drive in and back? A. That is right.

Q. Did you observe grain on the highway as you would drive in and back?

A. A very slight amount until the time that the tailgate on the truck—

Q. But was there always grain on that highway as you would drive in and back? [266]

A. No, sir.

Q. There would be times there was none?

A. That is right.

Q. At times there was some?

A. At times there were some.

Q. How long is that stretch of highway?

(Testimony of Ralph Smith.)

A. I believe it is about five miles from the ranch to the scales.

Q. There would be some all the way along that highway; is that it?

A. No, sir; not all the way.

Q. Would it be in spots?

A. As I remember it, there was a short section of road that was paved road, and along that paved road there was relatively little grain at any time.

Q. How long was that stretch?

A. Well, sir, that I don't remember.

Q. How often did you drive it?

A. I drove the road every day that we hauled grain to Macdoel.

Q. You don't remember how long the stretch was?

A. I would say it was about a mile or a mile and a half, but I wouldn't swear to it.

Q. There was no grain there?

A. Relatively little grain. [267]

Q. Then where did you start finding more grain?

A. Well, as I say, it was from the point where I noticed the endgate open until the ranch.

Q. How far was that?

A. I would say that was about two and a half or three miles.

Q. So there was some grain at all times for that two and half to three mile stretch?

A. After the harvest was started, well into the harvest, I would say there was a little grain, yes.

Mr. Tonkoff: That is all.

Mr. Kester: That is all.

(Witness excused) [268]

LEONARD FLINT

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Flint?

A. I live at Beaverton, Oregon.

Q. What has been your occupation?

A. Farmer.

Q. Are you farming now?

A. Not at the present time.

Q. You are more or less retired right now?

A. Yes.

Q. How long have you been acquainted with the farming business? A. All my life.

Q. What type of farming have you done?

A. Grain farming.

Q. In what parts of the country?

A. In Adams County, Washington.

Q. In Eastern Washington? A. Yes.

Q. Were you familiar with the Meiss ranch in Northern California?

A. Well, not too familiar, no.

Q. Did you work there during the summer of 1953? [269]

A. I worked there during the harvest.

(Testimony of Leonard Flint.)

Q. During harvest time? A. Yes.

Q. Do you know the Barrs?

A. Yes, sir.

Q. Had you worked on the Barrs' Oregon ranch?

A. I worked on the ranch at Mikkalo.

Q. How long did you work there?

A. Well, about three years.

Q. Were you working there in the summer of 1953? A. Yes.

Q. Did you work through the harvest of 1953 on the Oregon ranch? A. Yes.

Q. After completing the harvest there did you go down to the Meiss ranch? A. I did.

Q. Did you help take some equipment down there? A. No.

Q. When did you get down to the Meiss ranch?

A. I got there the 10th of September.

Q. What was your job then in the harvest?

A. I operated a machine.

Q. By a machine you mean a combine?

A. Yes, sir. [270]

Q. Had you operated a combine before?

A. Yes.

Q. Over how long a period of time had you had experience in operating combines?

A. About 15 years.

Q. Had the harvest already started when you got to the Meiss ranch?

A. Well, they had cut a little piece of wheat a day or two before that.

(Testimony of Leonard Flint.)

Q. So that you were practically at the beginning of the harvest? A. Well, yes.

Q. From that time on did you operate a combine continuously during the harvest?

A. I did.

Q. What can you tell us with respect to the way the harvest was conducted?

A. Well, I think it was conducted in a business-like manner.

Q. Did you notice any unusual amount of grain being wasted in the fields? A. I did not.

Q. Will you describe for us how the harvesting operation was carried on later, and what happened to the grain.

The Court: That is cumulative, Mr. Kester.

Mr. Kester: Very well. [271]

Q. Did you notice grain spilled in the fields following the combines? A. No.

Q. What type of machine did you operate? The self-propelled?

A. I operated the self-propelled.

Q. Did you notice the condition of the fields after the harvest was completed?

A. In what way?

Q. Well, as to whether there was grain left in the fields. A. No, there was not.

Q. You know there was not. I am not sure that the answer was clear. Was there any grain left in the fields after the harvest?

A. No, there wasn't any except at the weed patch.

(Testimony of Leonard Flint.)

Q. At the weed patch. What was the condition there? A. Well, it was awful weedy.

Q. What did that do to the harvest?

A. Well, you couldn't separate the weeds from the wheat or the grain.

Q. Will a combine run in weeds like that?

A. Not too good.

Q. What happens when it does?

A. Well——

The Court: That is also cumulative.

Mr. Kester: Q. Did you operate a combine in the weed patch yourself? [272]

A. I did.

Q. Did you have the experience of it plugging up with weeds? A. Some.

Q. Do you recall whether, as the grain was harvested, it was all ripe enough for immediate shipment? A. No, it wasn't.

Q. What was done with that that was not?

A. It was put in bins there on the ranch to dry.

Q. And then rehandled for loading?

A. Then rehandled.

Q. Were you there until the end of the harvest?

A. I was.

Q. About when did you leave?

A. Oh, I couldn't say exactly. It was probably about the 14th.

Q. Of October? A. Yes.

Q. Did you notice any of the combines being operated at too fast a speed?

A. No, I didn't.

(Testimony of Leonard Flint.)

Mr. Kester: I think that is all.

Cross Examination

By Mr. Fertig:

Q. May I ask you, Mr. Flint—you had a ranch of your own, did you say, up in Adams County, Washington?

A. No, I didn't. I said I had worked on ranches in Adams County.

Q. In Washington? A. Yes.

Q. Did you study the terrain down here in the Klamath Falls area where this Meiss ranch is?

A. What do you mean, study the terrain?

Q. Look over the layout of the ground, the different kinds of land.

A. Oh, I saw the land, yes.

Q. You saw it. How does that compare with the land that you were used to farming up there in Washington?

A. It is a different type of land altogether.

Q. A different type of farming operation, isn't it?

A. Well, I don't know. It all adds up to the same thing.

Q. It does? A. Yes.

Q. You mean you don't farm different kinds of land differently?

A. No. You have to till the land, don't you?

Q. Don't you give different care to different types of soil? A. Oh, I suppose.

Q. Don't suppose, sir. You are an experienced

Testimony of Leonard Flint.)

farmer. Don't you give different types of care to different types of soil? A. Yes. [274]

Q. Don't you harvest it a little differently based on terrain? A. No, you don't.

Q. You run your combine the same way on hilly land as you would on flat land, you run it the same if you have cracks or openings as you do on land that you do not, and you run it the same on land where the wheat is very low or your crop is very low as you do where it is much higher? You run it all the same. Is that your idea?

A. You have to go over the land, don't you, just the same?

Q. You run it the same way?

A. Why, certainly.

Q. No difference. That is how you would run your combine. You wouldn't study the land or anything else. Is that your testimony, sir?

A. You study the height of your wheat or your grain, don't you, and you cut—

Q. I am asking you, sir. You will answer me, please. You are going to run it the same regardless of what part of the United States you are located in, whether you are on flat land, hilly land, dry land, or soggy land? It doesn't make any difference?

A. In heavy grain you run your machine—you don't run the same speed, no.

Q. You don't? A. No, you don't. [275]

Q. Have you ever had experience in land just like there was on that Meiss ranch? A. No.

(Testimony of Leonard Flint.)

Q. You had never been on that ranch before the 10th of September? A. That is right.

Q. Is that right? A. That is right.

Q. You don't know how it was farmed or anything else about it before the 10th of September, do you?

A. No, I wasn't there to see how it was farmed.

Q. How did you happen to be working for Harvey Barr or Clay Barr that year?

A. I was working for Clay Barr on the Oregon ranch.

Q. Had you worked for him previously?

A. Yes.

Q. How long?

A. About five years.

Q. Always in Oregon?

A. Oregon and in Washington.

Q. Oregon and Washington. You mean he had a ranch in Washington too?

A. Before he moved to Oregon, yes.

Q. You are not related to him? A. No.

Q. Your only relation has been that of employer and employee, and you worked for salary or wages?

A. Yes. His wife is my daughter.

Q. His wife is your daughter. Then your acquaintance with him has been since this marriage?

A. Yes.

Q. That has been some time?

A. A little time, yes.

Q. Would you say there were quite a lot of weeds on that ranch?

(Testimony of Leonard Flint.)

A. On this one particular spot, yes.

Q. Lots of them? A. Lots of them.

Q. Enough to destroy the crop?

A. Well, I would say yes.

Q. Were there any weeds up any place else?

A. No.

Q. What did the grain look like in the dobe land?
A. Well, it looked very poor.

Q. A pretty poor crop? A. Yes, sir.

Q. Were there cracks in that land?

A. Some.

Q. Was the land dry?

A. I would say it was. [277]

Q. Large cracks, small cracks, and different sized cracks; is that it?

A. Oh, I didn't pay any attention to that part of it.

Q. What?

A. I say, I didn't pay any attention to the cracks.

Q. You drove over them every day, didn't you?

A. Well, they were not so large but what you could—

Q. Didn't you look at them?

The Court: He didn't testify about anything like this on direct. Gentlemen, I am going to hold both sides down closer from now on. I am not going to let you ramble any more.

Mr. Fertig: That is all, your Honor.

Mr. Kester: Thank you.

(Witness excused) [278]

PERRY MORTER

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Morter?

A. I live at Hooper, Washington.

Q. How old are you? A. Twenty-one.

Q. What has been your work?

A. I have been a farmer.

Q. How long?

A. My entire life.

Q. You were born and raised on a farm?

A. Yes, I was.

Q. Have you been working for Clay Barr?

A. I have worked for Clay Barr.

Q. Have you also worked for Harvey Barr?

A. Yes, I have.

Q. Did you work on the Meiss ranch during the summer of 1953? A. Yes, I did.

Q. When did you first see the Meiss ranch?

A. The first part of May of 1953.

Q. What was the occasion for your being there?

A. I went along with Harvey Barr, accompanied Clay Barr to [279] drive down to the ranch because of Mr. Barr's age. I just went along to accompany him driving because of his age.

Q. Did you go around with him and look at the place at that time? A. Yes, I did.

(Testimony of Perry Morter.)

Q. What was the condition as you saw the ranch at that time?

A. At that time most of the land around there was very wet.

Q. Was the seeding going on at that time?

A. Yes, it was.

Q. Did you come back then again at a later time? A. Yes, sir.

Q. When was that?

A. I went along with my brother, Harold Morter, and Clay Barr down to the place approximately the 10th of May.

Q. Did you and your brother then work at the seeding? A. Yes, we did.

Q. Do you recall how much had been seeded before you fellows started in?

A. Approximately the various fields that had been seeded, I do recall that.

Q. Which ones had already been seeded before you got there?

A. What has been referred to as the dobe ground, which lies on the west side of the place, and the weed patch, which lies down on the south-east side of the place.

Q. Did you stay there and work during the seeding? [280]

A. Yes, I did.

Q. How long were you there for that part?

A. We finished seeding the first part of June, and we finally finished our work which we had to

(Testimony of Perry Morter.)

do around there at approximately the 20th of June.

Q. Then what did you do?

A. I came back up to Harvey Barr's ranch in Lacrosse, Washington.

Q. Then did you come back to the Meiss ranch again? A. Yes, I did.

Q. About what time?

A. Approximately the 12th or 15th of July.

Q. What was that occasion?

A. Clay Barr took me down there to take care of whatever work was necessary to be done and to keep him informed of any unusual conditions which might arise. That is, I was taken down there for the purpose of following Clay Barr's orders as to whatever he told me to do, and inform him of any unusual conditions that he would be interested in.

Q. Then did you stay there from about the 12th or 15th of July through to the end of the harvest?

A. Yes, I did.

Q. Were you there all that time?

A. Yes, sir.

Q. What was the condition of the fields and the crop up in this dobe ground as the summer went along? [281]

A. The dobe land was dry.

Q. Did you make any attempt to do any more about that? A. Yes, we did.

Q. What was that?

A. After we were down there Clay told me to

(Testimony of Perry Morter.)

try irrigating at various places, which I did try to do.

Q. What did you try to do in the way of irrigating?

A. There were some small ditches out through that dobe ground there, and we would cut those ditches open at various spots and irrigate from them.

Q. What happened to the water? How did it act?

A. The land was very unlevel up there. You couldn't turn that water on there fast enough to make it reach those high points but what it would go down in the lower bottomland.

Q. Did you have some orders about the water as far as the bottomland was concerned?

A. Yes, sir. I called Mr. Barr and told him what the conditions of irrigation were as I had found them when we were trying to irrigate, and he ordered me to shut the water off.

Q. Before that did you have some instructions about whether you should let water get down into the bottomland or not? A. Yes, sir.

Q. What were those instructions?

A. He told me not to let any water get down in the bottomland. [282]

Q. Did you know the reason for that?

A. Just my personal opinion. I would have thought that water down in the bottomland was likely to start a second growth which would delay the harvest of that grain.

(Testimony of Perry Morter.)

Q. Now what was the condition of the ranch as far as weeds were concerned? Were there any weeds except in this one patch that has been referred to? A. None to speak of.

Q. In that weed patch was there any grain crop there along with the weeds? Did that amount to anything?

A. There was a grain crop there, but it was a very poor one.

Q. Do you know why the grain was poor there? Were you there during the time it was starting to grow?

A. That portion of the ground was already seeded when I got there, and I am unable to say what the cause of it was, but that grain looked yellow and sick from the time I saw it.

Q. Was it sick all summer long?

A. It appeared to me to be.

Q. Did you participate in the harvest?

A. Yes, I did.

Q. What was your job in the harvest?

A. I operated a John Deere rig, a combine.

Q. Had you operated a combine before?

A. Yes, sir.

Q. Over what period of time had you had experience with [283] combines?

A. I have been working and operating combines—I first started when I was 16 years old. That was back in 1950.

Q. This combine that you were operating on the Meiss ranch, was that a part of the regular equip-

(Testimony of Perry Morter.)

ment of the Meiss ranch or one that was brought in specially?

A. That was part of the regular equipment of the Meiss ranch.

Q. Was it being pulled behind a tractor?

A. Yes, sir. It was a pull machine.

Q. Did you notice any unusual amount of grain being spilled or wasted after the combines?

A. No, sir. There was no unusual amount of grain being wasted out of any of those combines that I observed.

Q. Did you notice any of the combines being operated at too fast a speed? A. No, sir, I didn't.

Q. Did you have occasion to go back and forth on the road to town?

A. Occasionally in the morning when maybe it would be too damp to harvest, or maybe a slight rain condition in the morning, and we might have a loaded truck to go to town. That was very few times, though.

Q. Did you notice grain that was spilled from the endgate that came loose from a truck?

A. Towards the end of the harvest I did notice a place where [284] there appeared to be such an accident.

Q. Up until that time had there been any unusual amount of grain along the roadway?

A. Not that I noticed, sir.

Q. What is the fact as to whether the harvest started as quickly as the grain was ripe enough to cut?

(Testimony of Perry Morter.)

A. We started just as soon as the grain was ready to cut. In fact, we were waiting around there just a couple of days before it was ready.

Mr. Kester: You may inquire.

Cross Examination

By Mr. Fertig:

Q. You say you went down there early in May of 1953?

A. The first part of May; yes, sir.

Q. And that was just to drive Mr. Barr's father down?

A. Yes, sir. That was the occasion for me going along with him, because otherwise I would have been on his ranch working.

Q. Whose ranch? A. Harvey Barr's.

Q. I see. Are you related to the Barrs?

A. Yes, sir; I am.

Q. What relation are you?

A. Harvey Barr and my grandfather are brothers.

Q. In addition to being a farmer during the last several [285] years you did go to school, didn't you?

A. Yes, sir; I did go to school. I graduated in 1952.

Q. What school was that?

A. That was the Lacrosse High School at Lacrosse, Washington.

Q. Then after you graduated did you take up farming as a full-time occupation?

A. Yes, sir; I did.

(Testimony of Perry Morter.)

Q. And you have done that continuously ever since? A. Yes, sir.

Q. You are now presently occupied in farming as an occupation? A. That is correct.

Q. Where now?

A. At Harvey Barr's ranch at Lacrosse, Washington.

Q. Then your experience as a farmer has always been with the Barrs; is that it?

A. No, sir. I had experience with Clay Barr in the year of '53 as a farmer.

Q. Now, as to the farming conditions up in Lacrosse, Washington, is that irrigated farming?

A. The majority of it is not irrigated farming. However, there is some irrigation.

Q. There is not very much around there, though, is there?

A. It is growing all the time.

Q. What?

A. There is portions of the Washington country up there that [286] is getting irrigated more all the time.

Q. Around Lacrosse, I am talking about.

A. Around Lacrosse there isn't too much irrigation, no.

Q. How about Harvey Barr's farm?

A. We don't do any irrigating there.

Q. Then where had you had any experience in handling irrigated farming?

A. I have never had any experience in handling irrigated farming before.

(Testimony of Perry Morter.)

Q. So in 1953, when you testified that you were sent down or taken down there by Clay Barr—I believe you testified like this: “Clay told me to try irrigating the dobe land.” Was that your testimony? Do you remember that, sir?

A. I believe that is correct.

Q. What experience had you ever had in trying to irrigate any kind of land before that?

A. I have never had any experience.

Q. You say there were ditches built through that dobe land?

A. Not sufficient to irrigate the land down there.

Q. You are going to be an expert on irrigation now?

A. No, sir; I don't pretend to be an expert.

Q. Then just answer my question.

Mr. Kester: Pardon me. Let's confine the cross examination to the direct.

Mr. Fertig: Q. I will ask you to answer my question, [287] please. I believe the question was were there ditches through that dobe land.

A. Very few.

Q. Were there ditches upon the dobe land? You can answer that Yes or No, sir. Were there irrigating ditches in the dobe land? You can answer that Yes or No.

A. Portions of it there was, and portions of it there wasn't.

Q. But there were ditches; is that correct, sir?

A. There were a few ditches, yes.

(Testimony of Perry Morter.)

Q. And those were irrigating ditches, weren't they?

A. They were put there for that purpose.

Q. Now was there a pump up near there?

A. About one-third up in the dobe land.

Q. How did that pump operate?

A. Why, that pump elevated this water from the main canal coming from the lake up into these smaller irrigation ditches up there.

Q. Did you know how to operate that pump?

A. Yes, sir; I did.

Q. Did you use it? A. Yes, sir.

Q. Then didn't it force the water into the dobe land?

A. Portions of it it did and portions of it it didn't.

Q. But portions of it were able to receive beneficial irrigation through the use of that pump; isn't that right? [288]

A. Very small portions of it.

Q. What do you mean by "small portions"? How much? How much acreage is there in this dobe land?

A. I never heard any acreage quoted, and I wouldn't be able to give you any acreage estimate.

Q. So you can't give any acreage estimate. You have never done any irrigation work before you were taken down there and put in charge; is that correct? A. That is correct.

Q. Now, when you were down there in May of 1953—you were talking about the weed patch. When you were down there in May of 1953 you say they

(Testimony of Perry Morter.)

were planting the weed patch? A. No, sir.

Q. Were they seeding it, or what were they doing with it?

A. It had already been planted at that time.

Q. What was the condition of the crop?

A. It looked very sickly.

Q. Were there any weeds there then?

A. I really didn't observe it at that time.

Q. Now you looked around there, didn't you? You saw the crop, and you saw the crop was sick. Now if there had been any weeds there wouldn't you have seen those too?

A. Small weeds, when they are first germinating, are very hard to see.

Mr. Fertig: Just a moment. If the Court please, that [289] can be answered—

The Court: You let him alone. Quit riding that young fellow.

Read the question.

(Last question read.)

The Court: Answer the question.

A. Yes, sir.

Mr. Fertig: Q. Were there any there?

A. A few.

Q. You saw a few. Were there enough to interfere with the crop at all?

A. I couldn't tell at that time.

Q. Then you came back on the 10th of May; is that correct? A. That is right, yes.

Q. Did you look at that area again?

A. As we were going out to our work we had

(Testimony of Perry Morter.)

to go by it every day, and I did observe the area.

Q. How did it look then?

A. There were a few weeds in it, and the crop looked very sick.

Q. Was anything being done about the weeds then?

A. I really wouldn't know about that, because I wasn't in charge of the operation.

Q. Then you went back the 10th of May and you stayed on until into June? [290]

A. That is correct, sir.

Q. During that time did you observe—you stayed until what part of June?

A. Approximately the 20th of June.

Q. Did you observe between the 10th of May and the 20th of June whether anything was done to the weeds that were starting to grow in what you call the weed patch?

A. No, sir; I didn't.

Q. They were just left to grow; is that it?

A. As I said before, I wasn't in charge of the place, and I wouldn't know if there was any attempt made or not.

Q. Who else was there? Who was in charge?

A. Clay Barr, sir.

Q. Was he there?

A. The majority of the time; yes, sir.

Q. And by the majority of the time you mean from the 10th of May to the 10th of June?

A. That has been back quite some time, but to the best of my knowledge I believe that he was.

(Testimony of Perry Morter.)

Q. What were your particular duties?

A. I worked with Clay Barr as maintenance and care of the machinery, mostly, and operating the machines whenever it called for it.

Q. Did that take you out into the fields, or did that keep you right by the house or by the sheds?

A. No, sir; that took me out into the fields on various occasions.

Q. When you went out to these fields didn't you observe whether anybody was working in them, whether they were spraying or whether they were doing anything about the weeds or not?

A. Yes, sir.

Q. Did you ever see anybody doing anything about them?

The Court: You admit, don't you, that there was never any effort at weed control?

Mr. Kester: Certainly, your Honor, not in this weed patch, except for plowing up some of it.

Mr. Fertig: All right.

Q. Did you ever observe up to the 10th of June when you were there any irrigating going around that particular ranch?

A. No, sir; I didn't.

Q. I see. So as far as you know there was no irrigating done up to and including the 10th of June when you left? Is that a fair statement?

A. That is correct.

Q. Then you left on the 10th of June and didn't come back until the 12th or 15th of July; is that correct?

A. Yes, sir.

(Testimony of Perry Morter.)

Q. So naturally you don't know anything that took place while you were away?

A. That is natural; yes, sir. [292]

Q. Then you came back the 12th or 15th of July. Clay Barr took you down there, I believe you testified, to do any work and to keep him informed as to unusual conditions that he might be interested in. Now what unusual conditions did he want you to tell him about?

A. Why, there was always unusual conditions, such as the potato men were using water there, and there was always a possibility of someone running a ditch over and getting that water down into parts of the grain land where you wouldn't want it.

Q. If something like that happened, where would Mr. Barr be? Would he be up on his Oregon ranch?

A. I would call his Oregon residence, his Oregon ranch.

Q. Then you would tell him that something unusual happened?

A. Yes, sir.

Q. He would be several hundred miles away?

A. Yes, sir; in case that anything unusual did happen.

Q. I see. Now, with regard to this irrigating, we have covered that with one exception: Did Mr. Clay Barr give you any lessons in irrigating before he left?

A. He showed me which ditches up there he wanted opened up at different times.

Q. Did he show you how to hold the water?

(Testimony of Perry Morter.)

A. Yes, sir; he did.

Q. Were you able to do it after he had showed you, or did it [293] run into the bottomland?

A. That is, he showed me how to plug the main ditches and build up the water in them to raise the water level high enough so that you could open them at various points and make the water run out.

Q. That is all he showed you?

A. Yes, sir.

Q. From then on you were on your own?

A. Yes, sir.

Q. It was something you had never done or tried to do before?

A. No, sir. I had never irrigated before.

Mr. Fertig: That is all. Thank you.

Mr. Kester: That is all.

(Witness excused.) [294]

HAROLD MORTER

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Harold, you are the brother of Perry, who was just on the stand? A. Yes, sir.

Q. Where do you live?

A. I live at Doebay, Washington, at present.

Q. You work on a farm? A. Yes.

Q. Whose farm? A. Scott Barr's.

(Testimony of Harold Morter.)

Q. Have you worked on various ranches during your life? A. Yes, I have.

Q. What is your age now?

A. Twenty-six.

Q. How long have you been doing farm work?

A. I have been doing farm work in the West since 1948.

Q. Were you on the Meiss ranch during the summer of 1953? A. Yes, sir; I was.

Q. When did you come down there?

A. Well, it was around the 8th or 9th of May.

Q. Did you work during the planting? [295]

A. I did.

Q. What job did you have?

A. Well, I drilled, run disks, and also serviced equipment and harrowed some.

Q. How long were you there for the planting?

A. I was there until we was through.

Q. About when was that, do you remember?

A. Well, we was through about the 5th, the 5th to the 8th of June, along in there sometime.

Q. What was the weather like during that time?

A. From the time we went there until we finished seeding?

Q. Yes.

A. Well, it was a pretty nice day when we got there, and I think the next day was pretty nice, and then it rained a lot for the next two or three weeks. Up into June it rained a lot.

Q. Was the soil pretty wet during most of the planting season?

(Testimony of Harold Morter.)

A. Very wet. Very wet. Water on top of lots of it, just seeping out.

Q. Do you remember how much had already been planted when you got there?

A. Well, when we went on the ranch, why, there was a section in the southeast corner had been seeded, and what we referred to as the dobe ground over in here somewhere.

Q. The section in the southeast part, is that what has [296] been referred to as the weed patch?

A. That is correct.

Q. Who had done that seeding?

A. Well, I don't know who had done it. I understood that Bud was in charge while it had been done.

Q. But it was under the prior management?

A. That is right.

Q. Then after you finished seeding what did you do?

A. Well, I helped construct a canal out there to distribute water that was being pumped out of the lake to lower the lake.

Q. That was up on the sagebrush land?

A. That was up on the sagebrush.

Q. How long were you there during the summer?

A. Until about the 19th or 20th of June, along in there.

Q. Then where did you go?

A. I went back to Washington.

Q. Working on a farm?

(Testimony of Harold Morter.)

A. That is right.

Q. When did you come back to the Meiss ranch?

A. Well, it was in September sometime.

Q. You came back for the harvest?

A. That is right.

Q. Did you work in the harvest?

A. I did.

Q. What did you do? [297]

A. Oh, ran a combine, drove truck, and helped load grain.

Q. Had you run a combine before?

A. Yes, sir; I have.

Q. For how long? How many years have you had combine experience?

A. I think I put in about 160 days previous to going on that ranch to harvest.

Q. One hundred sixty days?

A. That is right.

Q. How many different harvests would that be?

A. About five.

Q. You were driving a combine during five years? A. That is right.

Q. What kind of a combine did you drive on the Meiss ranch?

A. Well, I first run the John Deere pull machines, and later I run the John Deere 55, which is a pusher.

Q. A pusher is self-propelled?

A. Self-propelled.

Q. That is one that came down from the Northern Oregon ranch?

(Testimony of Harold Morter.)

A. No, that is one he rented from Mr. Stevenson.

Q. Did you notice any unusual or excessive amount of grain being wasted in the fields during the harvest? A. No, I didn't, sir.

Q. What is the fact as to whether there was always a certain amount of spillage from any combine? [298]

A. Oh, yes, you can have a little loss of grain, a little spillage.

Q. Was there any more than you would ordinarily expect? A. Oh, no, sir.

Q. You say you occasionally drove trucks. Did you drive into town?

A. Yes. Yes, I did.

Q. With loads of grain?

A. With loads of grain.

Q. Did you notice this place where an endgate came loose and some grain was spilled?

A. Towards the tail end of the harvest there was one tailgate jiggled loose and let out some grain.

Q. Up until that time was there any unusual amount of grain spilled along the road?

A. No, you couldn't see any grain along there.

Q. Going back for a minute to the seeding, was there some area that was reseeded, seeded a second time?

A. Yes, there was a small area in that same plot of ground referred to as the spud ground. It was west of the spud ground. There was a small area there that was reseeded.

(Testimony of Harold Morter.)

Q. Why was that?

A. Well, it had got so wet that it kind of drowned out.

Q. How long were you down there then? When did you finish the harvest?

A. About the middle of October. We finished harvesting a [299] little before that, but we had a little grain to remove. We left there about the middle of October, or a little later.

Q. You stayed until the end of the harvest, did you?

A. Yes, I stayed until we was all through.

Q. You didn't go back afterwards?

A. No, sir; I didn't.

Mr. Kester: I think that is all.

Cross Examination

By Mr. Fertig:

Q. You say you had been out here in the West farming about how long?

A. Since 1948.

Q. 1948? A. That is right, sir.

Q. Whom have you been employed by since that time?

A. Harvey Barr and Clay Barr.

Q. Now you say you work for Scott Barr?

A. That is right, sir.

Q. That is another member of the same family?

A. Correct.

Q. Are you a member of the family?

A. Well, a distant relative.

(Testimony of Harold Morter.)

Q. What experience had you ever had with farming in an area and terrain like they have down there around Tule Lake and [300] Klamath Falls?

A. I wouldn't say I had—I had a little experience in Montana on similar terrain, but I wouldn't say it is a similar climate.

Q. A different climate?

A. Well, a little different, yes.

Q. An irrigated farm?

A. You wouldn't exactly call it an irrigated farm. On level soil like that, if it gets wet then you drain it.

Q. It is a little bit different than down here around Klamath? A. Yes, it is a little different.

Q. Then you farm a little differently in each area, don't you?

A. Oh, yes. Each area is farmed a little different.

Q. Each kind of soil requires a little different treatment to do its best? A. That is right.

Q. When you went down there the first time what was that date?

A. Well, it was on Sunday. It was the early part of May, around the 8th or 9th, or somewhere in there.

Q. And this place referred to as the weed patch, was that all planted? A. Yes. Yes, it was.

Q. Was wheat growing in it?

A. Was what growing in it? [301]

Q. What was growing in it?

A. Well, the grain was just coming up.

(Testimony of Harold Morter.)

Q. It looked pretty good?

A. Well, it was just coming up; just coming up.

Q. No weeds?

A. No weeds when we first went down there, no.

Q. Then you came back later, or did you stay on there for awhile?

A. I helped through the seeding until I left along somewhere in the latter part of June.

Q. In the latter part of June?

A. Yes. I don't know about the latter part. You see, we finished seeding sometime between the 5th and the 8th, and then I was there a little longer and helped on that dike, and then I left.

Q. In June? A. In June.

Q. You stayed there continuously?

A. I was there all the time.

Q. Was Clay Barr there all the time?

A. Yes. Yes, he was there. He wasn't there all the time, but he was there until we was practically through seeding.

Q. He wasn't there from the 5th to the 10th of June, was he?

A. No. I don't know whether that is the exact dates or not, but he wasn't there for a little while somewhere between there. [302]

Q. There was other times he was away too, wasn't he?

A. Overnight or gone maybe for a short trip up to his home in Oregon and back.

Q. How far is his home in Oregon from that ranch? A. Around 300 miles.

(Testimony of Harold Morter.)

Q. Now you stayed there. Did you watch the crop starting to come up during the latter part of May, especially around that weed patch area?

A. Well, they grew a little; not hardly any in May. In June they started progressing a little.

Q. Would you say they were progressing nicely in June?

A. Well, I don't know. It had rained so much, and parts of it was awful wet, and the grain didn't look so good. It showed signs of yellowness in spots.

Q. But it was growing?

A. It was growing a little.

Q. Were there any weeds then?

A. Well, not that I observed. There could have been, but I never went out and looked for weeds. I just looked at it as I drove by in a rig. If there was any weeds they was too small to see without getting right out there and looking for them.

Q. In other words, the crop was ahead of the weeds; is that right? If there were any weeds the crop was ahead of the weeds? [303]

A. Well, the crop was just up.

Q. Yes, but into June I am talking about now.

A. Yes.

Q. In June about how high was it?

A. Oh, I don't remember. It didn't have any height to speak of, but it was green. It had a green cover and looked green.

Q. Did it gain any height by the 10th or 12th of June? A. Not much.

Q. Six inches? A. Oh, no, no.

(Testimony of Harold Morter.)

Q. Not even that much? A. No.

Q. Now this dobe land, did you ever see that from the time you left in June until you came back in September? A. No, sir; I didn't.

Q. How did it look in June?

A. Well, it didn't look like there had been a very good job of seeding done to us.

Q. Had you done much seeding of this type of crops yourself?

A. No, sir; but the preparation of the ground didn't look very good to us.

Q. It didn't look good to you?

A. No, it didn't.

Q. That was your own personal opinion?

A. That is right. [304]

Q. With regard to the seeding do you have enough experience to form an opinion as to whether it was seeded properly or not?

A. The seed bed didn't look good. It was just—to anybody that is associated with agriculture and kind of thinking that way, it just didn't look good. That is all.

Q. Was the crop starting to grow?

A. Yes. Yes, it was coming up.

Q. Was it coming up to any height?

A. No, not to speak of.

Q. Just getting started. So when you left everything was in its infant stage, just budding out, and when you got back it was harvest time?

A. Well, there was none of it very high when I left because we had just got it in.

(Testimony of Harold Morter.)

Q. That is what I say. It was very small when you left? A. Most of it.

Q. Then you didn't come back until September?

A. That is right.

Q. So anything that took place with regard to the crops, or anything, between early in June and September you wouldn't know anything about?

A. No, sir.

Q. Did Clay Barr tell you that the dobe land was not properly seeded in May? [305]

A. I don't recall of him saying that it was.

Q. I see. He didn't say it was not properly seeded either, did he?

A. I don't remember that he said it was or wasn't, no.

Q. Now you were asked about unusual spillage along the road. What is usual spillage?

A. What is usual spillage?

Q. Yes. How much of a truckload should you lose on the way in over a five-mile stretch?

A. I don't see why you should lose any.

Q. You testified that you didn't see any unusual spillage. Now that means there was some wheat always around, doesn't it, falling off the trucks?

A. I don't recall of saying that.

Q. Maybe not. I thought I copied it. Was there wheat along this stretch of road that had fallen off the trucks? A. No, no.

Q. There wasn't any? A. No.

Q. In the rough stretch before you got to the paved stretch did you see any there?

(Testimony of Harold Morter.)

A. The only wheat I saw on the road was on the instance when the tailgate jiggled loose on the tail end.

Q. You didn't go back to town very much, did you?

A. Yes, I did quite a little. [306]

Q. There wasn't any?

A. Not that I noticed other than the instance of the tailgate.

Mr. Fertig: That is all, Mr. Morter.

Mr. Kester: Thank you, Harold.

(Witness excused.) [307]

WARREN FARNAM

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Farnam?

A. Sir?

Q. Where do you live?

A. Macdoel, California.

Q. You live on the Meiss ranch now?

A. Yes, sir.

Q. Do you now operate the Meiss ranch?

A. In conjunction with my brother.

Q. For how long have you been more or less acquainted with the Meiss ranch?

(Testimony of Warren Farnam.)

A. Well, the first time I saw it was the 21st day of August, 1953.

Q. You went down there?

A. No, I came up there. I was in the air force at Sacramento, and I met my brother and my father down there to look at the ranch. I got a 24-hour pass.

Q. You were looking at it with the notion that you might be interested in taking it over?

A. That is right. My brother had talked to the real estate man that had the place listed with Clay. I was due to get out of the service in January, and wanted to try to line up some [308] place to move to. So he called me and made an appointment to meet him, and we met there on the 21st day of August.

Q. Had you had farming experience before you went in the air force?

A. Yes, sir. I farmed with my dad from '36 to '41, and then my brother and I farmed in Benton County, Washington, in what they call the Horse Heaven country, for five years, until I was recalled for the Korean war.

Q. What kind of farming had that been, mostly?

A. Mostly stock and grain in Whitman County, and dry land wheat operation in Horse Heaven.

Q. Now did you make a deal with Clay Barr to take over his lease there after the harvest of 1953?

A. Yes, sir. My brother negotiated most of the deal, since it took about a week for me to get out of the service. I requested an early out, and I ar-

(Testimony of Warren Farnam.)

rived back and went through by the ranch around the first of September, or the 2nd of September, I believe it was.

Q. Now I believe the assignment of lease is already in evidence. After that was signed when did you come onto the place again?

A. Well, after the 2nd—I believe it was the 2nd day of September my wife and children and myself drove by. We stopped by about 15 minutes. I don't remember the dates, but it seems to me like it was around the 10th, or somewhere in [309] there my brother and his father-in-law and brother-in-law and myself came back down to the Meiss ranch.

Q. Were you on the ranch enough during harvest to pay any particular attention to the harvest that was going on?

A. No, sir. I didn't see much of the harvest. Actually, the only combines I was even close to were the ones down there in the weed section. One of my cousins happened to be operating the self-propelled. We sent him down to help Clay finish up there so we could get the equipment. In fact, we sent two men down there. And I went out to the combine and hollered at him a couple of times, but I made no observations about the grain or the harvest. Actually it was late and we were worrying about plowing and diking.

Q. When did you come in then to take over?

A. Pardon?

Q. When did you take over?

A. Theoretically we were supposed take over on

(Testimony of Warren Farnam.)

the 1st of October, but in the lease agreement or the purchase agreement with Clay I think it was stated in there that as soon as he finished the harvesting we were to get the equipment. And they had some grain to haul after they had finished harvesting, so we didn't get the trucks at the same time. And then the potato people used the trucks. I believe it was around the middle of October sometime before we got two tractors to go to work on the dike with.

Q. You had actually started in, then, a little bit before Clay was all through?

A. That is right. I was sleeping in the bunk-house with Clay. The houses were occupied by my brother and his family, who first came down there, and by Bud Stevenson and his wife and the cook that lived there. My furniture was in Sacramento and my family was in Whitman County.

Q. You mentioned some plowing. Did you do some plowing that year? A. Yes, sir.

The Court: What is the point of that?

Mr. Kester: It relates to the condition of the field after the harvest, your Honor.

A. Around a thousand acres, I believe.

Mr. Kester: Q. Did you get out in the field yourself in connection with that? A. Yes.

Q. Did you find any unusual or excessive amount of grain lying in the fields left from the prior harvest when you got into your plowing?

A. Well, I never paid any real close attention to the windrows, but I did see a few piles of grain where an elevator plugged up, which is natural. We

(Testimony of Warren Farnam.)

had it this year. We have had it both years we have operated the ranch. You plug up an elevator with damp grain, and usually the machineman will [311] kick it around with his foot so a cow won't get three or four gallons of it, if there happens to be that much. But I never noticed any excessive waste behind the combine. I never made an effort to look for it.

Q. If there had been a lot of grain lying around would you have noticed it?

A. I will tell you when I would have noticed it. When you burn stubble if there is any wheat to amount to anything lying in the windrows it sticks up there where the geese can really get to it.

Q. Did you notice any?

A. I didn't notice so much in the area we burned.

Q. You operated the ranch in '54 and '55, you and your brother? A. Yes, sir.

Q. What was your experience with the crops in those years?

Mr. Tonkoff: That is objected to.

The Court: Objection sustained.

Mr. Kester: Counsel was permitted, your Honor, to offer evidence of the production on other places, estimates of production.

The Court: At that time, the same time, the same year, 1953.

Mr. Kester: No, your Honor. They went clear back to '47.

The Court: I shouldn't have let them do it. I

(Testimony of Warren Farnam.)

suppose [312] he may state very generally if he has had satisfactory results or not.

A. Due to the frost we haven't, sir.

Mr. Kester: Q. Have other factors entered into it?

A. Yes, sir. This year we had a dry year, and some of the ground we have had tested and found that it is carrying a definite alkali content that will not raise grain.

Q. Have you made a study of the soil conditions, the soil on that ranch?

A. Yes, sir. I have had the United States Soil Conservation test it and the Simplot Soil Builders from Idaho test it.

The Court: Don't give the details.

Mr. Kester: Q. You have made a study?

A. Definitely.

Q. What have you found with respect to the nature of the soil there?

A. The soil in the biggest share of the bottomland, the good land, is good soil. And the so-called weed section I keep hearing about is alkaline. We haven't raised a crop on it in two years.

Q. Have you made any effort to counteract the alkali?

A. Yes, sir; fertilizer at \$12 an acre on 450 acres of it in 1955, this spring.

Q. It still didn't make a crop?

A. Definitely not. We plowed it up. [313]

Q. What about the dobe ground up in the west end?

(Testimony of Warren Farnam.)

A. We experimented with that last year and had a fine stand of foliage on it. I would say that we cut somewhere around 1500 pounds to the acre on it. But it had a definite frost to it. We couldn't absolutely separate it from the rest of the grain, but I would guess 1500 pounds. It is a very good type soil. The soil itself is good on it.

Q. Have you tried to irrigate it?

A. Not since we have been on the ranch. We have never been associated with an irrigated ranch before, and we requested the help of the Soil Conservation Service and different farmers there to help us out on it and teach us something that we didn't know. Some recommended some watering.

The Soil Conservation and the Oregon—

Mr. Tonkoff: That is hearsay, your Honor, and I object to it on that ground.

The Court: Continue.

A. The Oregon State Experiment Station said we didn't have the water to do it with.

Mr. Kester: Q. Have you made a study of the water on the ranch? A. Yes, sir.

Q. What have you found with respect to the quality of that water?

A. The lake water on the ranch we had tested, and the Oregon [314] State Experiment Station—

Mr. Tonkoff: That is hearsay. I object to it.

The Court: Continue. Objection overruled.

A. The Division of Water Resources of the State of California tested it and told us we would

(Testimony of Warren Farnam.)

be using very toxic water if we irrigated with any lake water any time of the year.

Mr. Kester: Q. Have you ever examined and studied various soil maps showing the nature of the soil there? A. I have.

Q. Is there any Class 1 soil on the ranch?

A. No, sir.

Q. What preparation of the seed bed did you make on the dobe ground before planting?

A. In the spring of 1954 we plowed, disk-plowed, the land three times and harrowed three times before we seeded it in, and definitely worked it. I has to be mulched. Mr. Stevenson, Sr., told us how to farm that.

Q. Did you do it the way he told you?

A. Yes, sir. He didn't necessarily say we had to do it six times, but he said that we had to work a mulch on top of the ground.

Q. Did that prove out?

A. Yes, it did. If it hadn't been for frost we would have had a good crop on it.

Q. Without irrigation? [315]

A. Without irrigation.

Mr. Kester: That is all.

Cross Examination

By Mr. Tonkoff:

Q. Mr. Farnam, you prepared the land this spring for seeding and then you didn't seed for two weeks, did you?

A. On which land, sir?

(Testimony of Warren Farnam.)

Q. On this ranch. To make a long story short, after you prepared the land for seeding you couldn't get finances and therefore you were two weeks late?

A. No, I wouldn't say that. When we reached the dobe ground, which was about halfway through the seeding season, the minute that was prepared we seeded it. I will agree that when we first got some of the good ground, which you people call the potato section—we did have it prepared and didn't have adequate financing to get it seeded, but that had nothing to do with the crop.

Q. That makes some difference, doesn't it, if you delay it two weeks?

A. It made it more expensive, but we had a fine crop.

Q. To make a long story short, this is good property, isn't it? A. Yes, it is.

Q. Have you examined that map of the classification of the [316] land down there, the Government map, where it shows 90 per cent of this land as Class 1 land, Mr. Farnam? Do you see Meiss Lake there, the land west of the lake?

A. Well, you are right, sir. According to my studies on it, this is a Department of the Interior map, which since last year has been outlawed against making soil conservation tests. Their classification is according to the slope and the terrain of the soils. This Soil Conservation map right down here, which shows the peat land is Class 2, is the only legal map in existence on that soil, from my studies on it.

(Testimony of Warren Farnam.)

Q. You say this land is valuable land?

A. Yes, sir.

Q. It sold for two million dollars, did it not, in this month, to Doris Day and McCrea, actors?

A. I would say it was near two million.

Q. Have you paid off these notes that you owe Mr. Barr, one note that is for \$5,000 due June 1st, 1954?

A. No.

Q. Have you paid the note that was due on October 1st, 1954, for \$7,500?

A. No, sir.

Q. Have you paid off the \$2,500 note due October 1st, 1954?

A. We have that note back.

Q. What is that?

A. We have that note. [317]

Q. Were you subpoenaed to come up here?

A. Sir?

Q. Were you subpoenaed to come here?

A. No, sir.

Q. You and Mr. Barr have been friendly for a number of years, haven't you?

A. I met Mr. Barr on a lease deal in 1949, I believe it was. That is the only time I have ever met the man.

Q. Don't you live in the same part of the country?

A. I knew his father by sight and I knew his reputation from Whitman County.

Q. He was the one that introduced you to this

(Testimony of Warren Farnam.)

property down here and took you down there and showed it to you?

A. No, sir. The real estate man in Spokane did.

Q. Is that Higgins?

A. No, sir.

The Court: It doesn't make any difference. I don't care anything about that.

Mr. Tonkoff: That is all.

(Witness excused)

Mr. Kester: You Honor, I think it will not be necessary to call Roy Farnam. However, I would like to offer in evidence the original deposition of Mr. Kirschmer, which is already in the Court's file, and the exhibits referred to therein, which I believe are attached to it; also the original deposition of Mr. Hofues, which is in the Court's file. I have here the exhibit that was identified at that time, which I also offer in evidence, which is a lease to Jack Ratlaff on some of the potato ground.

The Court: Admitted.

(The deposition of Frank Kofues was received in evidence; and the lease above referred to was received and marked Defendants' Exhibit 19.)

Mr. Tonkoff: You Honor, I offered Kirschmer's deposition on our case.

Mr. Kester: You offered Kirschmer's deposition?

Mr. Tonkoff: Yes.

Mr. Kester: It is already in evidence, then. I

wasn't sure when you offered your depositions, Mr. Tonkoff, whether you excluded the depositions of people who testified in person. Did you mean to offer all the depositions taken also?

Mr. Tonkoff: No, because I felt when they testified that the Court would hear their testimony.

Mr. Kester: That is my understanding, too.

The Court: You gentlemen state in the record at recess or at the conclusion of the case, if you have any doubt about the state of your record on your depositions, and whatever ones you offer are now and will be admitted subject to any objections.

Mr. Tonkoff: I have offered them. There is no doubt in my mind.

Mr. Kester: That concludes our case.

The Court: Can you finish your rebuttal by 1:00 o'clock?

Mr. Tonkoff: I don't think so, your Honor.

The Court: How much rebuttal will you have?

Mr. Tonkoff: I will have Mr. Stevenson, Sr., and Mr. Stevenson, Jr. And, your Honor, while we are on this point—

The Court: Before you leave this point, they have testified in great detail. I don't want you to go over the same ground with them.

Mr. Tonkoff: I don't intend to.

The Court: What other rebuttal do you have?

Mr. Tonkoff: Your Honor, in this situation—I don't know how the Court feels about it—there has been testimony introduced as to which I feel I should take the stand.

The Court: You may take the witness stand, but

under the rules of this Court and most courts I know of you will be precluded from arguing the case.

Mr. Tonkoff: Yes. If I take the stand I will not argue the case, your Honor.

The Court: All right. You can decide that during the lunch hour. How much rebuttal are you going to have besides the two Stevensons and yourself? [320]

Mr. Tonkoff And Mr. Welch.

The Court: We will come back at 1:30. I hope we get through in an hour, and you will then be prepared to argue.

(Thereupon a recess was taken until 1:30 p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows:)

Mr. Holst: Your Honor, I would like to make a motion for the Court's consideration.

At this time, may it please the Court, the plaintiff respectfully moves that the document in evidence which purports to be the resignation of Horton Herman, who was named as an original trustee in the Declaration of Trust, which resignation was accepted and confirmed by all of the beneficiaries except one, that that resignation be accepted by this Court and this Court adopt the resignation of Horton Herman as the Trustee, and will then be an accomplished fact.

This motion is based upon the fact, may it please the Court, that the trust res is in the custody of this Court and this Court has jurisdiction over the

trust, and the majority of the beneficiaries having requested his resignation, and his own deposition which is a part of the record in this case shows that Mr. Horton Herman himself testified that if the matter had been brought into court he would ask to be removed as trustee.

The Court: I will reserve decision along with all the other reserved questions in the case.

Mr. Holst: At this time I would like to make the following motion; that there be joined as parties plaintiff the following persons: Mr. E. J. Welch and Viola Welch, residing in the State of Washington; Roland P. Charpentier and Effie Charpentier, husband and wife, who reside in the State of Idaho, and Honorable John W. Cramer, who also resides in the State of Idaho.

I make this motion that they be joined as parties plaintiff upon the grounds that they are present in court and duly authorized to do so. They are beneficiaries under this trust.

The Court: The decision on that is reserved.

JAMES C. STEVENSON, Jr.

was recalled as a witness in behalf of plaintiff, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Stevenson, on or about the 15th day of September of 1953 did you have a conversation

(Testimony of James C. Stevenson, Jr.)
with Mr. Clay Barr in Macdoel or in the vicinity
of the ranch? [322]

A. Yes, I did. I went to Klamath Falls with
him.

Q. At that time what did Mr. Barr tell you in
connection with this litigation?

A. He asked me if I would step out of this
litigation; that he would give me copies of papers
to prove that I could get my \$15,000 out of my
ranch agreement.

Q. Where did he make that statement to you?

A. He was in a car somewhere between Macdoel
and Klamath Falls.

Q. Now, Mr Stevenson, was there any method
of irrigation down there besides the ditches?

A. Oh, yes. There is a sprinkling system on the
ranch.

Q. How large is the sprinkling system?

A. I believe it is a half mile long.

Q. Was that available during the season of
1953? A. Yes, it was.

Mr. Tonkoff: That is all, your Honor.

Mr. Kester: No more questions.

(Witness excused) [323]

EDWARD J. WELCH

was recalled as a witness in behalf of plaintiff, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. You are Mr. E. J. Welch, who has already testified in this case?

A. That is right.

Q. You are still under oath. Mr. Welch, is the type of combine operation that is necessary to combine grain on the land here under discussion the same type of combining that you do lands in other same type of combining that you do on land in other places throughout the Northwest?

A. No.

Q. Can you tell the Court the difference in the system of combining that is necessary, taking into consideration the land that is here in controversy?

A. Well, I think in dry land combining you have a different condition there. You can travel faster. You have less foliage. On the other you have got a lot of foliage. Therefore, you have got to go slower in order to separate your grain properly. Does that fully answer your question?

Q. Yes. You were present during the harvest, were you?

A. I was.

Q. Did you tell them anything about the way they were harvesting? [324]

A. I wasn't allowed to under our agreement.
Mr. Tonkoff: That is all.

(Testimony of Edward J. Welch.)

Cross Examination

By Mr. Kester:

Q. What do you mean, you were not allowed to under your agreement?

A. We had an agreement with those people that we were not to interfere in any way with the operation.

Q. You are referring to the assignment and the Declaration of Trust? A. That is right.

Q. That is the agreement?

A. That is right.

Q. You don't claim that there was any agreement other than what appears in the written document, do you? A. No.

Q. The only difference in combining on dry land and irrigated land is in the speed that you can operate?

A. That is right. That is the big difference. That is the biggest difference.

Q. The only difference there is that irrigated grain is apt to be a little heavier than dry land grain, isn't it? A. That is right.

Q. Though that doesn't have anything to do with the nature of the farming? It is the consistency of the grain itself, isn't it?

A. Well, it is just a matter of harvesting practice. It wouldn't be the farming, certainly. It would be the way you run your combine.

Q. Yes, but the difference is based on the consistency of the grain itself; isn't that so?

(Testimony of Edward J. Welch.)

A. That is right, how heavy it is and what the condition is.

Mr. Kester: That is all.

Mr. Tonkoff: That is all.

(Witness excused) [326]

JAMES C. STEVENSON

was recalled as a witness in behalf of plaintiff, in rebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Stevenson, did you ever make any statement to anyone that the property where the weeds were located you had not farmed in the previous two years because of the weeds?

A. No, sir.

Q. Had you produced crops on that prior to that time, prior to 1953? A. Yes, sir.

Q. At one time how many harvesters did you have harvesting in that area?

A. We have a moving picture of this particular spot where these weeds are. It just happened to be that the harvesters was all in the field when we took the picture, and there was 13 harvesters in there. And the harvesters was—the biggest one was a 20-foot cut, and most of them was 16-foot cut harvesters. And they was working in that field. They was working in that field where the weeds was supposed to be.

(Testimony of James C. Stevenson.)

Q. What part has Mr. Stevenson, you son, taken in developing this ranch?

A. What part did he take?

Q. What did he do in connection with the development of this ranch? [327]

A. The boy?

Q. Yes.

A. He was the foreman on the ranch, and he done a lot of repair work and mechanic work.

Q. In your opinion do you feel that he is a competent operator?

A. I recommended him very highly to Mr. Hofues when he bought the ranch.

Q. Mr. Stevenson, was there any other way of irrigating that property besides the ditches that were there?

A. Yes, sir. We had a portable spray rig. It wasn't a spray rig; it was a sprinkler system. It had 32 sprinklers on it, and it would reach approximately a quarter of a mile at a time. It had 32 sprinklers on it. We used this sprinkler on rough ground, where the water would run off too fast to irrigate, we used this sprinkler system.

Q. What was the value of that machinery in 1953 or the fall before when you turned it over to Mr. Hofues?

A. When we turned it over to Mr. Hofues we had a bank appraiser and one of the big machinery outfits appraise the machinery. There was \$150,000 worth of machinery on the ranch.

(Testimony of James C. Stevenson.)

Q. Was there adequate machinery there to cultivate that ranch?

A. There was adequate machinery to do anything that was supposed to be done on the ranch.

Q. What is the most that you have taken off of there in crops prior to 1953?

Mr. Kester: If the Court please, I understood—

The Court: Answer.

A. We took off 45 carloads of barley in '47.

The Court: Did you take off \$800,000 in any one year? A. Close to it.

Mr. Tonkoff: That is all, your Honor.

Cross Examination

By Mr. Kester:

Q. This year you had 13 harvesters in the weed patch, was that also '47?

A. I don't think it was. I think it was the year before that.

Q. 1946?

A. It was right in that particular time, '47 or '48, one or the other. I think maybe it was '47.

Q. That was the best year the ranch ever had?

A. That was the first year we had all the crop in, all the grain in.

Mr. Kester: That is all.

(Witness excused)

Mr. Tonkoff: We rest, your Honor. [329]

The Court: Surrebuttal?

Mr. Kester: One question, please.

CLAY BARR

one of the defendants herein, was recalled as a witness in his own behalf, in surrebuttal, and was further examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Clay, Bud Stevenson just testified a moment ago that you and he had a conversation where you said that if he would stay out of this lawsuit you would see that he got \$15,000. Did any such conversation ever take place? A. No.

Q. Did you ever have any conversation with him on the trip to Macdoel in connection with the scales? A. Yes.

Q. What was that conversation?

A. He went to Klamath Falls with me in order to get the bond to legally license the scales.

Q. What was the date of that, approximately?

A. Oh, it was just ahead of the harvest there sometime. We hadn't started loading out any grain yet.

Q. What was the conversation?

A. Oh, he had understood there that the Farnham boys was coming in to take over the place, and he had also understood that they was buying the property, after they took my lease they was negotiating to buy the property.

Q. That would be buying from Hofues and Kirschmer?

A. Yes, buying from Hofues and Kirschmer.

(Testimony of Clay Barr.)

And he was telling me of his agreement if the place was sold that he would get \$15,000.

Q. That was his agreement with Hofues and Kirschmer?

A. Yes, that was under his agreement with the place, and he was wanting to know what I knew about the sale of the property.

Q. What did you tell him?

A. I told him they was negotiating; that I had heard they was negotiating, but as far as making a sale I didn't know whether it had been made or when, or anything. It wasn't my business, actually.

Q. Was there any discussion at all about this lawsuit or a lawsuit like this?

A. I didn't know for sure that there was a lawsuit coming there. There was no evidence. We hadn't got the crop harvested. We didn't know how much grain there was going to be, and there was no evidence for sure——

Q. Did you ask him to stay out of any lawsuit?

A. No.

Q. Did you make him any promises as to what you would do if he did or did not get into a lawsuit? [331]

A. No. Lawsuits wasn't a consideration of our conversation.

The Court: Who owns the place now, do you know?

A. It is my understanding that there was a corporation formed and bought the place, which included three or four of the movie stars.

(Testimony of Clay Barr.)

The Court: Whom did they buy it from?

A. I couldn't rightfully say for sure.

The Court: The Farnam boys?

A. I think so, but I am not sure.

Mr. Kester: That is all.

Cross Examination

By Mr. Tonkoff:

Q. As a matter of fact, the Farnam boys had already purchased the lease from you prior to September 15th, 1953, hadn't they Mr. Barr?

A. Yes.

Q. What occasion was there for him to talk about whether or nor they were going to buy the place on September 15th when you were going to town?

A. They wasn't satisfied with the lease. They was wanting to own the place too, I guess.

Q. Well, you were out of it at that time?

A. Yes, I was out of it.

Q. What discussion could you possibly have with Mr. Stevenson concerning the property there?

A. He was wanting to know in regard to whether he could collect his \$15,000, I guess, and what I knew about it.

Q. You at that time didn't make any statement to him that if he kept out of this Welch affair and your affair that you would show him how to get that \$15,000?

A. I didn't have any way of showing him. It wasn't my business. I couldn't give him anything.

Mr. Tonkoff: That is all.

(Witness excused)

Mr. Kester: Before we commence argument, may I have the record show I renew my motion to dismiss that was originally filed, particularly on the two grounds mentioned in the memorandum that was submitted: defect of parties and failure of authority as Trustee—

The Court: The decision on all prior motions that have previously been reserved are further reserved until a later stage of the case.

Proceed to argument.

(The cause was argued to the Court at length by counsel for the respective parties, and thereafter the Court took said cause under advisement.)

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

ORAL DEPOSITION OF A. G. KIRSCHMER

Amarillo, Texas, January 5, 1955

This deposition is taken pursuant to notice, however the notice gave as the location of the deposition 4501 West 2nd Street in Amarillo, Texas, which is the residence of Mr. Kirschmer, and by agreement the parties have changed the place of the deposition to this office, which is at 3314 West 6th Street in Amarillo, Texas.

Mr. Kester: Is that satisfactory?

Mr. Tonkoff: Yes, sir.

Mr. Kester: Mr. Kirschmer, before beginning questioning you, under the rules of Federal Court you have the right to read over the deposition after it is transcribed and sign if you wish to; however it is customary to waive the signature and rely on the Court Reporter to take it correctly; and as far as we are concerned that is all right with us if it is with you.

Mr. Kirschmer: That is all right.

Mr. Tonkoff: It is all right with me.

Mr. Kester: I believe under the rules all objections will be reserved until the trial except with respect to the form of the questions. Is that satisfactory with you?

Mr. Tonkoff: That is all right.

Answers and deposition of A. G. Kirschmer, taken at the request of the Defendants, on the 5th day of January, 1955, before Joe F. Witt, a Notary Public and Official Court Reporter in and for Potter County, Texas, pursuant to the foregoing stipulations of counsel.

A. G. KIRSCHMER

being first duly cautioned and sworn by the Notary as a witness in the above entitled and numbered cause, testified as follows:

Direct Examination

Mr. Kester: Mr. Kirschmer, we are about to ask you some questions with respect to this law suit,

(Deposition of A. G. Kirschmer.)

which will be in lieu of your testimony at the trial in the event that you are unable to attend the trial when it comes up.

Q. (By Mr. Kester): Will you first state your name and your address?

A. A. G. Kirschmer, 4501 West 2nd.

Q. In Amarillo, Texas?

A. Amarillo, Texas.

Q. And are you a resident of Texas?

A. Yes, sir.

Q. How long have you lived in Texas?

A. About two and one-half years.

Q. As one phase of this case, Mr. Kirschmer, there has been a request made to the Court that you be named as an additional defendant, and there are matters now pending before the Court in that regard. I will ask you whether you have been served with any summons or complaint in this case within the State of Oregon? A. No.

Q. Did you or your family receive a copy or summons and complaint delivered here in Amarillo, Texas? A. No summons, no.

Q. Was a copy of a complaint left for you here in Amarillo, Texas at your residence?

A. I don't remember that one ever come here.

Q. In any event you haven't been served with any paper from the State of Oregon?

A. No, sir, that is right.

Q. This case, Mr. Kirschmer, involves the operation of a ranch which the parties have described as

(Deposition of A. G. Kirschmer.)

the Meiss Ranch in Northern California. Are you familiar with that ranch by that name?

A. Yes, sir.

Q. When did you first become acquainted with that ranch?

A. Oh, the first time I seen it was about the first of June, 1951—1952, let me see, that was 1952.

Q. What is your line of work, Mr. Kirschmer?

A. Farming.

Q. How long have you been engaged in that work?

A. All my life.

Q. What type of farming particularly have you been acquainted with?

A. Diversified farming, corn, wheat, the row crops, maize and so on.

Q. And in what general part of the country have your farming operations been?

A. Western Nebraska and Western Kansas, Eastern Colorado.

Q. What type of farming did you do in Colorado particularly?

A. Well, we done wheat farming and irrigated row crop farming.

Q. Are you interested in the grain elevator business in Colorado?

A. Yes.

Q. Now, here in Texas do you have farming operations here?

A. Yes, sir.

Q. What is the general nature of your farming operation here?

A. Oh, irrigated farming.

Q. What kind?

A. Irrigated farming; it is all irrigated here.

(Deposition of A. G. Kirschmer.)

Q. What type of crops particularly do you have here? A. Primarily cotton.

Q. Over the years have you been familiar with grain farming and raising of grains of various kinds? A. Yes, sir.

Q. You indicated all of your life you had been a farmer; approximately how many years have you been acquainted with farming as it relates to grains particularly?

A. Oh, since I have been growing grain, to a large extent, was probably since 1934, about, I have been a large grain farmer since then.

Q. Have you had grain farms that would be considered large operations? A. Yes.

Q. How many acres for example in grains have you had at any time?

A. Our largest operations where it was all cultivated was around seventeen or eighteen thousand acres.

Q. Where was that?

A. Eastern Colorado and Western Kansas.

Q. Was that irrigated grain?

A. No, sir, it was primarily dry land.

Q. Now, how did you first become acquainted with the Meiss Ranch in California?

A. At the request of Mr. Hofues, I went up in June, 1952, and inspected it.

Q. That is Mr. Frank Hofues? A. Yes.

Q. His name is H-o-f-u-e-s? A. Yes.

Q. And what type of an operation is the Meiss

(Deposition of A. G. Kirschmer.)

Ranch, what was it at that time, you describe it generally for us.

A. It was a grain operation primarily, and livestock, with a little diversified farming, with a little clover, but primarily barley and oats.

Q. Will you tell us approximately the size of the entire operation?

A. Around three thousand acres; of course that didn't comprise near all the land.

Q. How much land was involved, just approximately in the entire ranch, without trying to break it down as to different types?

A. It would be around four thousand acres, the total farming operations.

Q. Can you describe for us generally how the ranch was situated with respect to the land there, what the lay of the land was?

A. Originally it was a lake bed cleared up and there was a levy put up to hold the water out of the lake bed during the farming seasons; so when that dried up in the Spring of the year they went to farming it; after they got it plowed they would attempt to cultivate it and plant the grain.

Q. Was this lake bed relatively flat?

A. Yes, very flat.

Q. Around the fringes of the lake bed what type of land was there?

A. That was hard gumbo; it had some slope to it.

Q. Did the slope go up the foothills, up toward the mountains?

A. Yes, sir.

(Deposition of A. G. Kirschmer.)

Q. The lake bed itself, what kind of land was it, generally speaking?

A. Oh, it was just—the main lake bed was what they called peet soil. I don't know what other name you would give it. They called it peet, because it was made up primarily of vegetable matter. I think they gave it as ninety percent, over ninety percent organic lake bed, the vegetation predominated.

Q. Now, in order that we may orient ourselves a little bit, where, with respect to the ranch, were the main ranch buildings, on which side? Would it be on the North side, South, East or West of the ranch?

A. If I tell you where it seems to me, it would be wrong. It is supposed to be on the West side of the place—no, South, South, you look North from the place over the farming operations.

Q. Is it situated near a town?

A. Yes, it is reasonably close to Macdoel.

Q. M-a-c-d-o-e-l? A. Yes.

Q. California? A. Yes.

Q. About how many miles from Macdoel is the main ranch building?

A. Approximately five miles from the ranch buildings to town.

Q. Now, this levy that you spoke of, was that in existence when you saw the ranch the first time?

A. Yes.

Q. Generally speaking, which way did that levy extend across the ranch?

A. Primarily North and South.

(Deposition of A. G. Kirschmer.)

Q. Now, is there a well defined water course coming down through the lake bed there?

A. Yes.

Q. Does that have a name? Do you know? Is there a name for it?

A. No, just three mountain streams that flow upon the place; I don't remember that they had a name.

Q. Could you describe for us how this levy works from the standpoint of blocking off the water from certain parts of the ranch?

A. Well, the levy was put up to retain the water during the growing seasons so you could plant the crops and keep from flooding them out too for the summer months; it was made to hold her back during the summer months.

Q. Did it retain the water on the East side or the West side of the levy?

A. On the East side.

Q. On the East side. Now, the water that came down from the mountains, how did that get over—well, first let me ask; from which direction did the water come out of the mountains?

A. It come from the Southwest and the North side, Southwest and North side of the ranch, as I get it, down the various streams. In the winter time it didn't follow the stream at all; it just came on off of the mountains on the Meiss Ranch.

Q. Now, was there any provision made for getting that water into the area on the East side of the lake? A. Yes.

(Deposition of A. G. Kirschmer.)

Q. How did that work?

A. Large capacity pumping stations.

Q. Were there ditches and canals to collect the water? A. Yes, sir.

Q. And then there were pumping stations to pump the water over the levy into the East side?

A. Yes.

Q. And if I understand you correctly then the East side of the levy was a lake?

A. That is right.

Q. And the West side of the levy would be to some extent drained by these canals?

A. That is right, when you keep the water off, that would be your valuable land.

Q. Now, the situation as you have described it, is that the way it appeared to you when you first saw the ranch?

A. Quite so. I didn't get a true picture of it just one time looking over it, there was quite a lot to see, but that is about the way it looked to me.

Q. And has that stayed pretty much the general picture of the place ever since? A. Yes.

Q. Now, when you went there to look at it, who was on the place? A. Jim Stevenson.

Q. Was he the owner? Do you know?

A. Yes.

Q. Now, you said you were looking at the instance of Mr. Hofues; did you then report to Mr. Hofues on what you found?

A. Yes, that is right.

Q. Did Mr. Hofues subsequently enter into an

(Deposition of A. G. Kirschmer.)

arrangement for the purchase of the ranch?

A. About, yes, about sixty days later he consummated the deal with Sterling Higgins.

Q. Who is Sterling Higgins?

A. Sterling Higgins was a real estate broker that worked the deal up.

Q. Where is Mr. Higgins located?

A. I believe he is in Spokane, Washington—wait a minute, I think it is Portland.

Q. Portland?

A. Spokane—I don't know, it was one or the other. I never met him. He always looked me up.

Q. In any event did he have the ranch listed for sale as a broker? A. Yes.

Q. And when Mr. Hofues requested you to examine the ranch was it having in mind the possibility that you would enter into the deal with Hofues?

A. Yes, he mentioned that to me at the time that I could buy into the deal if I wished to.

Q. Did you subsequently do that?

A. Yes, later on I did, after he contracted for it, made the deal, I later went in the deal with him.

Q. About when was it that you went into the deal if you recall, approximately?

A. September, 1952.

Q. And that then resulted in a purchase by yourself and Mr. Hofues from Mr. Stevenson through Mr. Higgins? A. That is right.

Q. Was that on a conditional sale's contract?

A. Yes.

(Deposition of A. G. Kirschmer.)

Q. And did you purchase all the equipment of the ranch with the ranch?

A. Yes, all the equipment and the land proper, buildings and all that, all the assets.

Q. Now, did Mr. Stevenson himself continue to have any interest in the place after the sale?

A. No.

Q. Did he stay on in that vicinity?

A. Yes.

Q. What land did he occupy?

A. He occupied the main headquarters, that is the buildings of the main headquarters, until about January of 1953.

Q. 1953? A. Yes.

Q. Now, did Mr. James Stevenson have any other land in the immediate vicinity?

A. I don't think so, no.

Q. When you and Mr. Hofues purchased the property was the ranch subject to any existing leases to anyone?

A. I think yes, just for a one year lease.

Q. And to whom was that?

A. Had Noakes.

Q. Noakes?

A. Noakes, Had Noakes, H-a-d-l-e-y, I think Hadley is the name? It is just Had they call him.

Q. Would that be James H. Noakes, H. for Hadley, would that be it? A. Yes, J. H. Noakes.

Q. Now, what arrangements did you and Mr. Hofues make for the management of the ranch after you purchased it?

(Deposition of A. G. Kirschmer.)

A. I employed the son of Mr. Stevenson, known as Bud Stevenson.

Q. Do you know his given name?

A. No, that is all I know, Bud, that is all I ever heard.

Q. You employed him as manager?

A. Yes.

Q. Generally, without going into detail, what kind of arrangement did you have with him?

A. Well, of course, originally when we took over we merely hired him to harvest that crop.

Q. In other words, you came in at a time when the crop was about ready for harvest?

A. Yes, it was getting pretty close to harvest, so he went ahead with the equipment that was on the place and harvested the crop.

Q. Was there a crew of men on the place to work it?

A. Yes, he got some more men that was required to put over the harvest.

Q. Had Bud Stevenson been familiar with the place during the time his father owned it?

A. Yes, sir.

Q. Had he lived and worked on the place while his father owned it? A. Yes, sir.

Q. Did Bud Stevenson then proceed to proceed with the harvest in the Fall of '52? A. Yes.

Q. Did that arrangement with Bud Stevenson then continue in '53?

A. No, we made a new agreement with him for '53.

(Deposition of A. G. Kirschmer.)

Q. What was the nature of that agreement?

A. We hired him for a given salary, plus a small percent of the net profit.

Q. And was that to run for the entire season of 1953?

A. That was the way the contract was drawn up, yes.

Q. And did he then continue with the management of the ranch into 1953?

A. That is right.

Q. Do you know what work he did on the ranch in the Spring of '53?

A. Well, he planted what crops he could plant, so he claims, up to a certain time until we got there, which was around the first of May.

Q. Did you and Mr. Hofues visit the ranch about the first of May in '53? A. Yes, sir.

Q. What was the occasion for your visit? What was the reason for going?

A. To check up on the operation.

Q. What did you find when you got to the ranch about the first of May in '53?

A. Well, after checking the operation over we decided we would never get it planted the way it was going.

Q. And why was that?

A. There wasn't any management; there wasn't no question, it just seemed like it was sitting high and dry, the way it looked to me.

Q. Had very much been planted at the time?

A. There had been some planted there, yes.

(Deposition of A. G. Kirschmer.)

Q. Would you describe for us the planting that had been done?

A. He had what we considered in the neighborhood of 1,000 acres. It wasn't measured, but that was approximately what we thought he had planted, and as a result of that work that had been done we made up our mind we had to make a change.

Q. You mean that the work was unsatisfactory?

A. Yes.

Q. In what respect was it unsatisfactory?

A. It wasn't a good job of cultivating done ahead of seeding.

Q. What effect did that have on the seeding then?

A. Well, if there is no moisture, you can't get a drill in the ground; he didn't make any mulch ahead of his drill, and when I come on the place the first thing I noticed was a fellow harrowing. I asked the man what he was harrowing for. I said, "You never have to harrow ahead of the grain drill", and he said, "To cover the grain." I said, "Don't the drill cover it?" And he said, "No, the drill didn't cover it." He said that he didn't have the ground worked, and this man was harrowing to try to cover that up sufficiently so that if the rain come it would germinate. He couldn't get the drill in because he hadn't worked the land sufficiently ahead of the drill; it was too hard.

Q. Did you find that the seed then was not in the ground where it should have been, but was lying largely on top?

(Deposition of A. G. Kirschmer.)

A. Well, I suppose what I seen was lying mostly on top. In some places in the field the ground must have been a little softer; that wasn't true all over the field though, but I seen enough of it to know that the boy didn't do me no job. I am in the habit of doing a pretty good job of farming. I made money at farming and I made it because I did my work right, and that didn't suit me, that job; it just didn't suit me. I wasn't going to go along with that.

Q. Were there other things unsatisfactory about the condition of the ranch when you saw it the first of May of '53?

A. Yes, there was — from an operating standpoint it was pretty wet right at that time.

Q. You mean the ground was wet?

A. Yes, pretty wet, it hadn't dried up so they could do the right kind of work.

Q. What effect did that have upon the operation of the ranch?

A. Retarded the seeding dates.

Q. Was Mr. Hofues with you at that time, too?

A. Yes, he was out there at that time, too.

Q. As a result of the visit that you and Mr. Hofues made about the first of May of '53, was there any change made in the management?

A. Yes, sir.

Q. What was that change?

A. We made a lease to Clay Barr.

Q. Now, how did you happen to make a lease to Mr. Barr?

(Deposition of A. G. Kirschmer.)

A. Well, Mr. Hofues had accidentally run onto Mr. Barr and discussed the matter with him and we agreed that we would look into it, so we went up to Klamath Falls and Clay met us there and we went and looked the ranch over and looked the operation over.

Q. Had you known Mr. Barr prior to this time?

A. Just had met him, yes, met him a time or two.

Q. Had you had some business transactions with him prior to that time? A. No.

Q. And when you went to Klamath Falls then who all were present? Were you and Hofues and Clay Barr all there together? A. Yes.

Q. Did you go out onto the ranch together?

A. All people concerned were there, Bud Stevenson.

Q. What was the arrangement then that you made with Mr. Barr?

A. To go ahead and finish planting the crop as best he could.

Q. And what arrangement for compensation was made? A. Divide to rent.

Q. Divide the crop? A. Yes.

Q. Was there a written lease prepared between yourself and Mr. Barr? A. Yes.

Mr. Kester: I will ask the Reporter to mark as an exhibit for identification the photostatic copy of this instrument.

(Whereupon an instrument consisting of two pages was marked Defendants' Exhibit No. 1.)

(Deposition of A. G. Kirschmer.)

Q. I will show you the lease marked Exhibit 1 and ask you if that is a photostatic copy of the lease that was prepared covering Mr. Barr's operation of the Ranch, and does it bear the signatures of yourself and wife and Mr. Barr?

A. Yes, that is the lease.

Mr. Kester: Is there any objection made on the ground of it being a photostat rather than the original?

Mr. Tonkoff: No.

Mr. Kester: We will offer in evidence in connection with this deposition this Exhibit 1.

(The instrument marked "Defendants' Exhibit 1 is attached to this deposition and made a part hereof.)

Q. Now, in this lease it mentions that the ranch is subject to some other prior leases, Stevenson and Noakes and another one for potato raising; would you describe the situation on those, please, sir?

A. Well, we had reserved 250 acres of the better part of the land for some tenants that we leased the ground to for the purpose of growing potatoes.

Q. Now, could you state generally where those 250 acres lay?

A. I wouldn't know the legal description, but it was north of the house, immediately north of the house, along the road as you go to work.

Q. And was there a road extending generally north from the house? A. Yes.

Q. Sort of bisecting the farmed area?

A. Yes.

(Deposition of A. G. Kirschmer.)

Q. West of the levy? A. Yes.

Q. And did the potato land lie on one side or the other of that road?

A. Yes, it laid on the west side of the road.

Q. West side of the road? A. Yes.

Q. That would be the side away from the lake part? A. That is right.

Q. Now, there was reference made there to a prior lease to J. C. Stevenson; what land generally did Mr. Stevenson have?

A. He had a pasture, the grass lands.

Q. How did the grass land lie with respect to the lake bed?

A. Laid around the edges, near the mountain's edges. We called it the "fringe area."

Q. Would that be around say the southerly side of the lake bed principally?

A. Yes, and west too.

Q. South and west? A. Yes.

Q. There was reference there to some land leased to Mr. Noakes; where did that land lie?

A. It laid south and east of the headquarters.

Q. Are you able to say approximately how many acres Noakes had leased? A. 800.

Q. Can you say approximately how many acres Mr. Stevenson had leased in pasture lands?

A. I believe we had it figured eleven hundred acres, fringe area.

Mr. Tonkoff: You say Mr. Stevenson had eleven hundred acres?

A. That is about what we figured it in that

(Deposition of A. G. Kirschmer.)

fringe area, eleven hundred acres. Now, he had another privilege in the brush land which was away from this that he pastured some on.

Q. Where did the sagebrush land lie?

A. It laid north of the lake.

Q. North of the lake?

A. North and probably a little east of the lake, yes, North and east of the lake is where the brush land lay; it wasn't in use and there was some grass on it, so they used it.

Q. Do you have any idea approximately how many acres of brush land there was?

A. About two thousand.

Q. Now, in connection with this lease to the potato raiser, did he have any rights with respect to use of water from the ranch?

A. Yes, he had prior rights to the water.

Q. And did the pasture land have any rights with respect to the use of the water?

A. Yes.

Q. What was their rights?

A. Well, whatever the potato people didn't use, he could use; that was agreed. I think this contract covers that.

Q. And did anyone else have any priority in the use of water on the ranch?

A. Not on the main body of the ranch that I know of.

Q. Now, the prior rights that the potato raisers had and that Stevenson had to pasturage, did they

(Deposition of A. G. Kirschmer.)

pertain to some particular stream or body of water or to all of the water on the ranch?

A. Well, to all of the water. Of course, they preferred—they took preference of the pump water and the water from the mountain streams; they preferred that, of course.

Q. What was the condition of the water in the lake area east of the dam?

A. Well, the water in the lake was not considered fit for irrigation after mid-summer, or about mid-summer.

Q. Why was that?

A. It becomes too alkalied.

Q. Is that an area where alkali was a problem?

A. Yes.

Q. And for the record, what is the effect of alkali on the farming operation?

A. It stunts the crops, when you water, and wet the alkali, water that drains through alkali land, why it stunts it and it ceases to develop. It shrivels and shrinks it seems like in growth.

Q. And would you explain briefly why it is that after the middle of the summer the problem is worse than earlier?

A. Earlier when the water drains into the lake it is pretty much pure mountain water. Then, you have three months of evaporation and some withdrawal, you are getting down a little lower to the lake bed and that lake bed has got lots of alkali on it, so the water becomes polluted after it stands there that long with the alkali, the water that is

(Deposition of A. G. Kirschmer.)

always in the lake. In the spring the volume of water is so great that the percentage of alkali is not so effective.

Q. Now, did that alkali from the lake beside the levy, did that seep out and affect the surrounding land?

A. I think it drained, it seeped some, yes.

Q. Did you find, for example, that immediately west of the levy that there was alkali?

A. Yes, there was considerable area there that didn't grow nothing but salt grass.

Q. Was that because of the effect of the alkali?

A. Yes, that is right.

Q. I will ask you when did Mr. Barr take over the management of the ranch?

A. Well, our lease was signed May 7th when he got down to take over the operation of the crop.

Q. The 12th of May?

A. It was the 12th of May, yes.

Q. That is in 1953? A. Yes, sir.

Q. And did he then go into the operation of the ranch and take it over? A. Yes.

Q. Do you know if he had the occupation use of all the ranch buildings there?

A. No, he didn't have all of them.

Q. Why was that?

A. Well, our former employee wouldn't release them.

Q. You mean Bud Stevenson? A. Yes.

Q. What was the situation with respect to Bud

(Deposition of A. G. Kirschmer.)

Stevenson's arrangement with you after Clay Barr came into the picture?

A. The arrangement was this, that after I made the lease with Mr. Barr, I went to the ranch with Mr. Barr and introduced him to Bud Stevenson, which, of course, wasn't necessary, for the reason that we had made a deal with Clay and I explained to Bud that he would be an employee of Clay Barr's now, that we had leased the place and he should go on working just like the contract called for, but Clay would be his employer; and he agreed that he would do it.

Q. And did Bud Stevenson then stay on for the rest of the season? A. Yes.

Q. And did you continue to pay him under your original contract with him?

A. No, we paid him on whatever the agreement was. We had an agreement with Clay that he pay him part and we pay him part.

Q. And Bud Stevenson himself then stayed in possession of some of the buildings?

A. Yes, the main ranch house.

Q. Now, did you—how long did you stay on the ranch during May of '53? How long were you around? A. About a week.

Q. Long enough to help Clay get started?

A. No, I was gone when he got there to go to work.

Q. When was the next time you were back on the ranch? A. Early September, 1953.

Q. Now when you came there in September,

(Deposition of A. G. Kirschmer.)

what did you find with respect to the condition of the ranch and its operation?

A. I found them getting ready to harvest, but they were too early; the grains were too green to harvest.

Q. Could you describe generally what crops there were on the place?

A. Yes, there were barley and oats and a little rye, but it didn't produce nothing.

Q. Would you describe the condition of the crops insofar as the yield and the stand, beside being green, what was the condition?

A. There was some right good crops and some very poor crops.

Q. Generally speaking, where did the poor crops lie?

A. They lay closer to the lake on that near the house.

Q. Closer to the lake would be on the west side of the dam?

A. Yes, the west side of the road that would be used to kinda separate the farm lands there. It would be the west side of the land—it wouldn't be on the west side. The land—it would be on the east side. It was on the east side, in answering your question.

Q. The east side of the road, west side of the dam? A. Yes.

Q. In other words, between the road and the dam?

A. Yes, that is right.

(Deposition of A. G. Kirschmer.)

Q. Approximately how large an area was in that, if you could tell us without trying to be exact, just approximately?

A. I believe it was about seven hundred acres in that one tract, I don't believe it was ever all planted, but there was about that much land in that one tract, between the lake and the road.

Q. And what crops had been planted there in the area that was planted?

A. Oats, barley and rye, I believe.

Q. What was the condition of that crop when you saw it in September?

A. Pretty weedy and very thin.

Q. Aside from that area, what was the general condition of the crops on this ranch?

A. Well, after we went down a ways we seen very good crops, some very good crops, especially the fall plowing made a very good yield. It looked good, too.

Q. There was some area that had been fall plowed? A. Yes.

Q. Where did that land lie?

A. It laid either a mile and a half or two miles north of the ranch house, and then there was a canal that went cross ways there and it was north of the canal that this plowed land laid, and that is, of course, where this heavy crop was.

Q. Was that approximately about what you would call the middle of the field?

A. Yes, I would say about the middle of the ranch.

(Deposition of A. G. Kirschmer.)

Q. In that area it was pretty good?

A. Yes, very good.

Q. Was that in any way related to the fact that it had been plowed in the fall?

A. I think to a great extent. They had plenty of loose ground to get a good mulch for the seeding in.

Q. The area where the crop was poor, would you know if that had been plowed in the fall?

A. No, sir, it hadn't.

Q. Was that the same area where you had observed the harrowing to cover up the seed?

A. Yes.

Q. Aside from the area that you have already described, were there any other areas where the crops were either particularly good or particularly poor?

A. I know some other areas where it was particularly poor.

Q. Where were they?

A. Around the fringe areas and a little farther north where I think they become affected with alkali again.

Q. Now, the fringe areas would be on the what side of the ranch generally?

A. It would be on the west and northwest, west and northwest.

Q. Is that a part of what you would call the original lake bed, or is that up on the side of the hill?

A. It kinda branches away from it, just kinda

(Deposition of A. G. Kirschmer.)

starts sloping a little bit, that is the fringe area where it starts to slope up the mountains.

Q. Is that soil the same character as the soil in the lake bed itself? A. No, sir.

Q. What kind of soil do you find up on the slope of the hills?

A. Hard gumbo, tough gumbo. When it is wet, it is tough, and when it is dry, it is hard.

Q. Now, is that land generally suitable for raising that kind of crops using the special treatments?

A. It should have special treatment.

Q. What kind of treatment does it need?

A. Chemical treatment.

Q. Had anything like that been done before Clay Barr came in? A. No, sir.

Q. Is that area on the side hill there suitable for irrigation?

A. When properly prepared, yes.

Q. What type of preparations would it need?

A. It should have had some leveling done, terracing and leveling.

Q. In order to permit it to be used?

A. Well, in order to handle the water; as it was, it was pretty hard to put just all over; you could get it some places.

Q. Was it possible to do that leveling after Clay Barr came in?

A. No, it was too late then. It was not a tenant's job anyway. It is too big a job for a tenant.

Q. In other words, the land in its then condi-

(Deposition of A. G. Kirschmer.)

tion was just handicapped by that character of irrigation?

A. The best you could do was just haphazard irrigation, hit here and miss there.

Q. Now, what was the situation of the ranch with respect to the potential irrigation for grain crops when you went in as purchaser? What did you contemplate in the way of irrigation, if any?

A. We never contemplated that. We never took into consideration any irrigation.

Q. In other words, you didn't plan that there would be any irrigation?

A. Well, Mr. Stevenson told us that they never irrigated to speak of. Once in a while they would sprinkle a little; they had a sprinkler there. He had a sprinkler there, but he said it wasn't necessary to irrigate.

Q. Did you discuss with Mr. Stevenson, the prior owner of the place, in respect to the proper way to get the best yields out of the ranch?

A. Yes, I did.

Q. And did you follow the advice he gave on it?

A. To a certain extent we did, maybe not 100%. We listened some to Bud and some to Jim.

Q. What did you find with respect to whether Jim or Bud had the best advice with respect to the operation of the Ranch?

A. We found Jim had the best judgment. His information was more reliable, as it proved out.

Q. How long had Jim Stevenson operated the ranch before you became interested in it?

(Deposition of A. G. Kirschmer.)

A. Eight years.

Q. And did you make a study of the situation to determine whether or not irrigation was proper or feasible?

A. Oh, I just never thought about it. We had so much land that didn't need irrigation we never thought about the irrigation part, just never took that into consideration.

Q. What part did not need irrigation?

A. All of the peat land. That was the low laying land that was considered the lake bed, which comprised twenty some hundred acres which didn't need irrigation that was plenty wet all summer, and that is the word I got from Jim Stevenson and Bud admitted that.

Q. Was that confirmed by your own observation?

A. Yes, there are enough moisture in the subsoil after the water was pumped off in the spring. It had saturated it so well that it would make a crop without any further irrigation.

Q. Now, insofar as the fringe areas were concerned up above the old lake bed, I believe you said that you didn't contemplate any irrigation on that.

A. I never thought about it at the time. If I had been operating it, I might have changed my mind. I just never got quite into the operation where I was with it all of the time, just never had a chance to study it that closely.

Q. Now, when you came there in September, did

(Deposition of A. G. Kirschmer.)

you stay on while the crop was being harvested or did you come back again, or what?

A. We come back and I went back again then, after the crop was about two-thirds harvested.

Q. Were you there while the harvesting operation was going on?

A. Yes, the last of it.

Q. What did you observe with respect to the way the harvesting operation was conducted?

A. Well, as I said, I didn't see it all, but what I seen, it seemed to be going along with a fair degree of efficiency.

Q. Did you have any criticism of the harvesting operation?

A. I didn't make any criticism.

Q. Did you observe whether or not there was any excessive waste of grain in the harvesting?

A. I didn't observe it. If there was, I didn't observe it.

Q. Did you observe whether or not there was any waste of grain in the hauling from the farm to the handling point? A. Just one spot.

Q. Where was that?

A. Somebody dumped a part of a load on the road.

Q. Do you know how that happened?

A. They told me the end gate came open.

Q. Aside from that accident, did you observe any wastage?

A. Oh, there was a little grain on the road, but any road you haul grain over you are going to see

(Deposition of A. G. Kirschmer.)

grain on the road now and then. I think I seen that much, but it wasn't what we call waste.

Q. Did you as an owner of the ranch have any criticism of the way that Clay Barr managed the ranch, either from the standpoint of growing or harvesting the crop?

A. No, I wasn't there all summer, you know, and I didn't see how it was done, but I didn't bring about any criticism from what I observed.

Mr. Tonkoff: What was the last you said?

A. I said I didn't offer any criticism from what I observed. I wasn't there all summer, you know.

Q. Did you have any dissatisfaction with the quantity or quality of the crop that was produced?

A. Yes, I did.

Q. What was that based upon?

A. Based upon fair return for land like that.

Q. Well, was that dissatisfaction directed in any way toward Clay Barr's operation of the ranch?

A. I didn't think so at the time, and I don't think so yet, not entirely; there might have been some improvements made, but it wasn't the primary thing that stood in the way.

Q. What was the primary difficulty?

A. The primary difficulty was—as I see it, the primary difficulty started with the poor job of seeding the first one thousand acres, and secondly, three weeks of cold wet weather. After that sprouted it just laid there and the weeds grew and the grain didn't grow. That is as I see it. And the wheat and the barley and the rye and the oats seemingly got in

(Deposition of A. G. Kirschmer.)

a weakened condition, and too there was some alkali in that grain; after the ground stood cold so long and wet so long the alkali came out, and I believe that was the primary reason why that seven hundred acre field didn't do no good, because the grain had come up pretty good at one time, but not too good, but it come up to a fair stand; and then when fall come there wasn't no grain there; it just dried out, that is what I am going by.

Q. You feel that it was the excessive dampness and alkali?

A. A cold, damp spring let the alkali do too much work before the grain got to going.

Q. From your experience in raising grain crops, could you tell us what could be done from the standpoint of spraying grain crops to keep down weeds?

A. That in some cases is very effective.

Q. In what situations will it work?

A. It works on some weeds; it doesn't affect all weeds so much, but some weeds die very readily from spraying; others it takes heavier charges.

Q. Do you know whether the weeds on this ranch, particularly with reference to that seven hundred acre tract you spoke of, whether those weeds would have been susceptible to spraying?

A. I don't remember ever spraying that kind of weed, but they looked like tough weeds to me; they are a legume weed; they are a tough legume, very fibrous weed and I don't know how much of a charge it would have taken to kill them, I am sure pretty strong.

(Deposition of A. G. Kirschmer.)

Q. If you had put a strong enough spray on to have killed those weeds, what would have been the effect on the growing grain crops?

A. I don't know the effect on the grain, but it is my opinion that it would have damaged it some too, if strong enough to have killed that crop of weeds that was on there.

Q. Was the grain crop itself in a weakened condition as a result of the dampness and the alkali?

A. That was the beginning of it. The weed, of course, as he was more rugged, he grew. I am assuming that is the way it turned out, I wasn't there after the last wheat had come up with it, and that is the information I got when I got there. They said that the weeds kept growing and the grain stood dormant in that cold spring.

Q. From your experience in spraying grain fields, if the weeds were strong and the grain was weak and you would put on a powerful enough spray to get the weeds, would it have damaged the grain crops?

A. Yes, it does; I have had it happen to me.

Q. Were you present in the vicinity of the ranch at the time the harvest was finished? A. Yes, sir.

Q. Were you around there as it was finished up? A. Yes, sir.

Q. Do you know what arrangements were made with respect to the sale or other disposition of the crops?

A. Now, when we got there the crop had been contracted.

(Deposition of A. G. Kirschmer.)

Q. To whom? A. Kerr-Giffard.

Q. And who had made the contract?

A. Bud Stevenson had made the agreement; as the information come to me, Hofues gave him the authority to sign the sales contract for a given amount, which I believe was \$3.00 a hundred, or \$3.10, something like that, and that contract was being performed when I got there, because most of the grain had been harvested. I was there the first of October and they were taking it to Kerr-Giffard then.

Q. So far as you and Mr. Hofues were concerned, Was Bud Stevenson authorized to make the deal with Kerr-Giffard?

A. Well, I don't think, in the contract, I don't think we plain gave him the authority to contract our grain; he was to contact us, and I think Hofues was the one that gave the authority to sell at that figure.

Q. Was that satisfactory to you?

A. Yes, that is as good as we could do; it was satisfactory.

Q. So, as far as you and Mr. Hofues were concerned the transaction where grain was sold to Giffard was satisfactory, was it?

A. Yes.

Q. Are there storage facilities for grain in the immediate vicinity of the ranch there?

A. No.

Q. How was the crop handled once the harvesting was done with it?

(Deposition of A. G. Kirschmer.)

A. Well, the ranch had a loading-out facility at Macdoel, and that is what we used to load it out.

Q. On rail cars? A. Yes.

Q. In other words, it was hauled directly from the ranch to cars?

A. Yes, to the little loading-out elevator we had there, to the little loading-out elevator and then it was put into cars.

Q. Was there any place anybody could have stored that quantity of grain?

A. No—there was, but they had their own grain; they were full.

Q. So that the loading on rail cars for immediate shipment was the only way you could dispose of it? A. That was the only way out.

Q. Do you know who made the arrangements for the sale to Kerr-Giffard of the interest besides that of yourself and Mr. Hofues?

A. I don't think I know just who made that contract.

Q. Now, after the harvest was completed, did you receive an assignment from Mr. Barr of the sum of \$15,000. out of the proceeds of the crop?

A. Yes.

(Whereupon an instrument was marked Defendants Exhibit No. 2)

Q. I show you a document marked Exhibit No. 2 and ask you if that is the original assignment from Clay Barr to yourself for the sum of \$15,000?

A. Yes, that is it.

Mr. Kester: We will offer in evidence, De-

(Deposition of A. G. Kirschmer.)
defendants Exhibit No. 2, and ask leave to substitute copies so that the original can be returned.

Mr. Tonkoff: That is all right.

Mr. Kester: I will now return the original to you and a copy will remain in lieu of it.

(Defendants Exhibit No. 2 is attached hereto and made a part of this deposition.)

Q. Have you had a transaction with Clay Barr involving the purchase by him of a grain elevator in Colorado?

A. Well, it wasn't my deal; he purchased it from Hofues.

Q. And then where did you come into it?

A. I bought the note.

Q. From Hofues? A. Yes, from Hofues.

Q. And this reference in the assignment to an obligation that Mr. Barr owed you, was that the result of that transaction?

A. Yes, sir, it was.

Q. At the time that that assignment was made, did Mr. Barr owe you \$15,000. on that transaction?

A. Yes, he owed more than that, but it wasn't due; it was due shortly after that.

Q. But there was a particular payment of \$15,000. that was due? A. Yes.

Q. And was this assignment made to apply on that payment? A. Yes, sir.

Q. Now, after the crop was in and sold for 1953, what was done with the operation of the ranch then? Did Mr. Barr continue in the operation?

(Deposition of A. G. Kirschmer.)

A. Yes, he was in charge of it then until the completion of harvest.

Q. And after the completion of harvest, then what occurred?

A. It was transferred to the Farnham Bros. then.

Q. F-a-r-n-h-a-m? A. Yes.

Q. How was that transfer completed?

A. Clay Barr made an assignment of his lease to the Farnham Bros.

Q. Farnham Bros?

A. Barnham Bros, yes. It is F-a-r-n-h-a-m, I think is how they spell it.

Mr. Tonkoff: It is "F-a-r-n-a-m".

The Witness: There is no "h" in it?

Mr. Tonkoff: There is no "H" in it.

Q. Then did the Farnam Bros, enter into any deal with you and Mr. Hofues? A. Yes.

Q. Now, the Farnam Bros. are still on the place?

A. Yes.

Q. And are they now engaged in the purchase of the ranch from you and Mr. Hofues?

A. That is what they are working on, yes.

Q. From your standpoint as an owner of the ranch and having an interest in the crop, is there anything wrong with the operation of Mr. Barr in managing the ranch for that year?

A. Yes, it wasn't his fault; he got there too late. If he would have started March 1st, I would have been critical on the operation, but being as

(Deposition of A. G. Kirschmer.)

he started as late as he did, I am not critical.

Q. Did you feel that he did the best that he could under the circumstances?

A. Under the circumstances, getting started late and wet weather hitting him, there was just nothing anybody could do.

Cross Examination

Q. (By Mr. Tonkoff): Mr. Hofues' full name is Frank Hufues?

A. I think it is Frank S. Hofues.

Q. How do you spell Hofues?

A. H-o-f-u-e-s.

Q. How long have you been acquainted with Mr. Hofues? A. About August, 1951.

Q. And prior to that time had you had any business with Mr. Hofues?

A. No, never met him.

Q. And when was the first business enterprise that you and he entered into?

A. That was in the latter part of August, 1951, I sold him my Corporation assets I had there at Burlington.

Q. Burlington what? A. Colorado.

Q. What was the nature of those assets, Mr. Kirschmer? A. My grain elevator and land.

Q. Is that the grain elevator that you purchased the note?

A. That is right.

Q. And then what did he do? Did he resell that elevator? A. He resold it.

(Deposition of A. G. Kirschmer.)

Q. What was the purchase price of the elevator or the assets from you?

A. A half million dollars.

Q. And was that paid for in cash?

A. Cash and trade.

Q. So that the grain elevator was paid up?

A. Yes.

Q. In other words——

A. He got a clear title to it.

Q. Mr. Hofues never owed you anything after August, 1951?

A. Well, he owed me some money, but not in that respect. He owed me some notes that he gave me that he didn't get paid at that time.

Q. Then he resold the elevator? A. Yes.

Q. Now, then, he resold the elevator?

A. Yes.

Q. And when did he resell it, Mr. Kirschmer?

A. I couldn't tell you the dates.

Q. What year? A. 1952.

Q. And do you remember what month?

A. It must have been early in the year, because there was a note signed there about February that as I remember it, the note I have was made first to Hofues and the Denver National Bank, and that is where I bought it.

Q. The note was made to whom?

A. Hofues, and he had it at the Denver National Bank.

Q. Who executed that note?

A. Clay Barr.

(Deposition of A. G. Kirschmer.)

Q. How much was the——

A. Betty Barr, I believe, Clay and Betty Barr.

Q. How much was the sale of that elevator?

A. That I didn't know. It was part cash and part trade consideration, so I don't know what they figured that they got out of it.

Q. How was this \$1000,000. note payable?

A. \$7500. a year and interest.

Q. And when did you get an assignment of this note?

A. I believe it was along March or April of 1952.

Q. Was anything due on the note at that time?

A. No.

Q. Well, in other words, when you took the assignment of the note, there was nothing, nothing——

A. Nothing due.

Q. Nothing due? When the first payment to be made?

A. As I remember, the first day of February.

Q. Of 1953? A. Yes.

Q. And was that made? A. Yes.

Q. And how much was the payment?

A. It runned \$12,500, I think is what it amounted to, as I remember it.

Q. How much interest does this note bear?

A. Five percent.

Q. And what portion of the note had been paid, was paid—in other words, what was the balance of the note? A. \$100,000.

(Deposition of A. G. Kirschmer.)

Q. And the first payment was made in March of when?

A. Oh, it was made I think in either January or February, 1953.

Q. The first payment on the note?

A. Yes.

Q. And was that paid? A. Yes.

Q. So that, is the note up to date up to now?

A. Yes.

Q. So Mr. Barr owes you nothing.

A. Nothing due now.

Q. Nothing due? A. No.

Q. I see. Now, at the time that you went over to the ranch in 1953—was that 1953? Yes, 1953, did Mr. Barr tell you that his share of the crop had been assigned to J. P. Tonkoff—

A. Yes, he did.

Q. When did he tell you that?

A. Oh, I don't remember. I just remember knowing about it, that is all. He told me about it there in the operation; he was around there when the harvest was going on when I got there.

Q. He told you that his share of the crop had been assigned to J. P. Tonkoff and Horton Herman? A. And Welch came in.

Q. E. J. Welch? A. Yes.

Q. Did he tell you of any others?

A. No, he didn't mention but two—he might have mentioned others, but that is all I can remember.

(Deposition of A. G. Kirschmer.)

Q. And did you look up to see whether that was recorded in Siskiyou County?

A. No, I didn't.

Q. When did he tell you of the assignment of the crop to myself and Mr. Horton Herman?

A. Oh, as I remember it, is was in the hotel when we got back. I believe he told us about it when we were first out there and he wanted to harvest in early September.

Q. So in September you knew that he didn't own that crop, his share of the crop?

A. Well, I knew that he owned an expense portion, he told me, he was entitled to certain portions of the crop and other than that, he made his assignment; that was the information he gave me.

Q. Did you look over the assignment as it was recorded? A. No, I didn't.

Q. Well, this payment that he assigned of \$15,000. was for the payment of the 1953 interest?

A. Yes, 1950—of course, the note is so drawn that he can pay any amount at any time.

Q. And he did make that payment that he owed you in 1953? A. Yes.

Q. When, in January of 1954?

A. When it was due; I think it was January or the first of February. It was the latter part of January or the first of February, around there somewhere, anyway it come.

Q. Has he made you the 1954 payment on that note? A. Yes.

(Deposition of A. G. Kirschmer.)

Q. So at the present time you have nothing coming on the note from the \$15,000. in Oregon?

A. Nothing due.

Q. Well, now, when did you and Mr. Hofues purchase this ranch?

A. Well, you might say when did Mr. Hofues purchase it; he was the one that purchased first; I came in later.

Q. Yes.

A. It must have been in early August.

Q. What was the purchase price, Mr. Kirschmer?

A. A little over \$1,000,000, I just don't know exactly, but it was probably a million and \$75,000, I believe.

Q. And you bought in a half interest as I understand, a little later on?

A. That is right.

Q. So did you and Mr. Hofues have equal say about the operation of the ranch? A. Yes.

Q. Now, you say Bud Stevenson had planted about 1,000 acres of grain when you went to see it in May. A. That is right.

Q. He was planting it then?

A. Yes, when he could get in the field he was planting.

Q. When did you again go to the ranch?

A. In September.

Q. You hadn't been there during the summer?

A. No, I hadn't never been there during the summer.

(Deposition of A. G. Kirschmer.)

Q. Well, you spoke on Direct Examination concerning the wet weather that they had in that vicinity in 1953; did you learn that by——

A. I called, I kept in touch with them by telephone and they told me it was very wet there.

Q. Who told you that?

A. I talked to Bud, and I talked to Clay; talked to everybody that was concerned who I could get information from, and I was quite disappointed. I know when I talked the crops should have all been planted. They were still waiting on weather that they could work in.

Q. Did you know of the condition of the crop in June of 1953?

A. No, I wasn't there.

Q. How many acres was Mr. Barr supposed to plant?

A. Well, all the land that he could possibly get in, all that he could possibly get in.

Q. Well, how many acres was that?

A. That around 2,000 acres, close; I think about 2500 acres, gross amount, including that that had been planted.

Q. It was closer to 3,000 acres altogether wasn't it, Mr. Kirschmer?

A. Well, no, the rest of it was in no shape to get in crops. It was too much work required to get it in shape for a crop.

Q. Now, what was he supposed to plant?

A. He was supposed to plant barley and oats, primarily, growing barley.

(Deposition of A. G. Kirschmer.)

Q. And wheat, wasn't he?

A. I don't think we mentioned wheat. We might have, but I don't remember that we mentioned wheat.

Q. Had you farmed in any country near Oregon, there in Oregon? A. Me?

Q. Prior to this time, Mr. Kirschmer?

A. No, I hadn't.

Q. Now, how many acres did he plant, do you know.

A. No, I don't know; there was part of it tore up after it was planted. It got weedy, so weedy that there was no way to harvest it.

Q. Well, did you know that he had plowed up some of it? A. Yes.

Q. Did you ever give your consent for it to be plowed up?

A. I don't remember that I was ever contacted on it.

Q. Well, now, in that country—are you familiar with the farming operation in that country, Mr. Kirschmer?

A. Not too good. I don't know too much about it, any more than what I have learned right there.

Q. Now, how many acres did you have planted the year before?

A. Well, Stevenson, he didn't have it all in either. I don't know, but probably 2,000 acres.

Q. And you got what—what returns did you get the year before, the gross amount?

A. Oh, it didn't run much more, just a little more.

(Deposition of A. G. Kirschmer.)

Q. A little more? A. Yes.

Q. How much more?

A. Well, I wouldn't swear to this, but I judge about \$10,000. more or maybe \$15,000. more; I believe that was about it. I know we were disappointed in the outcome.

Q. It brought in \$100,000. the year before?

A. Yes, a little over \$100,000.

Q. Over \$100,000? A. Yes.

Q. Do you remember about how much over \$100,000, Mr. Kirschmer?

A. \$110,000, I think, as well as I remember.

Q. And where was the crops sold to?

A. It was sold to Kerr-Giffard, too.

Q. It was sold to Kerr-Giffard, too?

A. Yes.

Q. Now, right now you have no interest in that \$15,000. that has been assigned to you in Oregon, have you? A. No.

Q. Now, did you see—when grain gets dry you must irrigate it or you are going to lose it, if you haven't got water available, wouldn't you?

A. Yes, if you have an irrigated farm you should irrigate it.

Q. Now, did you notice the crops out in the fields between the big drain ditches that are on that ranch? A. Yes.

Q. Did you notice the crop there?

A. Yes.

Q. They were not over knee-high, were they?

A. Well, what part of the place did you mean?

(Deposition of A. G. Kirschmer.)

Q. Well, most any place on the ranch where the crops were growing between these grain ditches that go through the fields?

A. Oh, I don't know. I seen a lot of grain got this high.

Q. When you say this high, you say about what, four feet?

A. Three feet.

Q. Three feet?

A. A lot of that grain got, must have got about three feet high.

Q. That is right, and the only place it got three feet high was around where it was damp, where it had the irrigation water, didn't it?

A. No, there was no irrigation; it was just simply in the lake bed, that don't require irrigation.

Q. Well, did you notice any of the ground, how it was cracked? A. Yes.

Q. That is lack of irrigation, isn't it?

A. No, nobody ever irrigated that place. That hasn't been the practice there at all. Mr. Stevenson told us that and he told us more than that, if you irrigated too much lake you are going to have frost take your crop.

Q. Well, but the reason that ground was cracked was because it wasn't irrigated, isn't that right?

A. It probably would have helped it if it had been irrigated, probably would.

Q. And the reason some of that grain wasn't

(Deposition of A. G. Kirschmer.)

more than knee-high was because it didn't receive the proper amount of moisture, isn't that correct, Mr. Kirschmer?

A. More moisture would have probably helped it, that is right.

Q. Twenty-eight hundred acres in that vicinity should have brought a quarter of a million dollars for that crop, shouldn't it?

A. Yes, we figured it should.

Q. And that is why you employed Mr. Barr to plant it then to get that kind of a crop?

A. I just wanted to get something planted. When we employed Mr. Barr; it looked like we weren't going to get it planted.

Q. Mr. Barr agreed to do that, didn't he?

A. Yes, sir.

Q. And he agreed to farm that property in a farmer-like manner, did he not, with you?

A. I thought he done about as well as anybody would considering circumstances. No, it wasn't farmed right good, but taking circumstances into consideration, naturally he couldn't.

Q. Well, a good farmer-like manner would mean spraying for grass when you found the weeds coming up through the grain, wouldn't you?

A. Yes.

Q. He didn't do that, did he? A. No.

Q. What? A. No.

Q. Well, now, the crop in 1953 brought a little over \$88,000, isn't that right? What was that?

A. I think that is somewheres near right.

(Deposition of A. G. Kirschmer.)

Q. Well, approximately; I am not asking to pin you down exact on it, because I have forgotten. And your share was released by myself so that you got your share of that crop? A. Yes.

Q. So the only proceeds that Kerr-Giffard has up there now, you have no interest in it?

A. No interest that I know of.

Q. Kerr-Giffard has paid them into courts since then? A. Yes.

Q. And you have no interest in that law suit up there whatsoever? A. No.

Q. You don't contemplate of ever making any claim against Kerr-Giffard for that money, do you, for the \$15,000?

A. No, I don't think I would.

Q. And you don't contemplate making any claim against these \$14,000. that is paid into court, do you? A. No, sir.

Q. Now, you say that you consulted with Bud Stevenson. A. Yes.

Q. Concerning the farming operation?

A. Yes.

Q. Was there any dissension between Mr. Barr and Mr. Stevenson?

A. Well, I wasn't around there all summer. I didn't know, but I heard there was.

Q. Where did you hear it from?

A. Oh, I guess pretty much everybody that talked about that operation; heard it from some of the boys that Clay had there on the place.

(Deposition of A. G. Kirschmer.)

Q. Did Mr. Stevenson ever tell you that the place should be irrigated?

Mr. Kester: Which Stevenson?

Mr. Tonkoff: Bud Stevenson I mean, the manager.

A. Yes, Bud told me that he thought it ought to be irrigated.

Q. And he also told you he didn't have the funds with which to hire help to irrigate and run the potato crop, too, didn't he?

A. Well, no, he didn't tell me that.

Q. When did he tell you that the property should have been irrigated?

A. I think it was in July.

Q. And at that time, didn't he tell you that myself and Mr. Barr and Mr. Welch had been down there?

A. I don't think he told me that then; I believe he told me later, when I got out there, I think he said that you should have been out there.

Q. And at that time did he tell you that Mr. Barr had promised to come down in a day or two and start the irrigation?

A. No, he didn't. He said that—he called me and told me that it should be irrigated. I said, "Well, I will call Clay," and I did.

Q. And about what time of the year was that?

A. Oh, I judge it was somewhere in the middle of July.

Q. And at that time it still hadn't been irrigated, had it? A. No.

(Deposition of A. G. Kirschmer.)

Q. Did you know that prior to that time, about approximately two weeks, that Mr. Barr and myself and Mr. Welch had been on the property?

A. No, I didn't know that. I might have heard it, but I just don't remember having heard it.

Q. Well, now, there was no irrigation done on the property except the small area there where Mr. Bud Stevenson did, is that right?

A. I think that is right.

Q. And that portion of the crop was the best of the whole field, wasn't it?

A. I don't even remember seeing that portion; it could have been, but I don't think they pointed that out to me.

Q. You didn't see the crop in June, did you?

A. No, I did not.

Q. Did you get any report concerning the crop in June? A. No.

Q. Did you know that in June the crop was in good shape up to the 10th or the 12th of June?

A. Well, I never heard anything from anybody in June. I got some reports in July and they said that the crops looked very good, but there was some ground, Bud said that there was some ground that needed irrigating.

Q. You have no idea how much ground was seeded, do you, Mr. Kirschmer?

A. No, I just couldn't tell you that.

Q. Did Mr. Barr—let's see, this lease provides for—who was to pay for the seed?

A. Mr. Barr.

(Deposition of A. G. Kirschmer.)

Q. And this lease says that he was to pay you for all seed that had been planted prior to that time? A. Yes.

Q. How much seed did he use, do you know?

A. No, I don't have a record of that.

Q. Did Mr. Barr do a good job of seeding?

A. Yes, I think he did. It looked like it was good work; after I got out there I could see the stuff he planted come up in rows; he had rowed it.

Q. When did you see that?

A. In the Fall.

Q. Was that some that was three feet high?

A. Yes, all heights; there was some of it that was down here.

Q. For the record, how high would you say that was, about knee-high?

A. Eighteen inches.

Q. What?

A. Eighteen inches, the shortest.

Q. You didn't see the crop then—so there won't be any mistake about it—I think you said until it was ready for harvest.

A. Yes, that is right. I went out, assuming the harvest was ready early in September and I found I was a month early.

Q. Did you have any frost in 1952?

A. Yes, light frost.

Q. Did it take any of the crop?

A. No, it might have done a little damage, but not noticeable.

(Deposition of A. G. Kirschmer.)

Q. Did you see them harvesting the crop in 1952? A. Yes.

Q. Had a pretty good stand at that time, did you not? A. Yes.

Q. You didn't see any grain that was eighteen inches in height, did you?

A. No. I don't think I did. I guess we did too, I will take that back. The fringe area, the gumbo was no good then, the same as now.

Q. Well, you sprayed it in 1952, didn't you?

A. I don't think so.

Q. For weeds?

A. We didn't, because we didn't have it that early. I don't think Stevenson did, because he didn't get it planted until June.

Q. The 1953 growing season was excellent, though, wasn't it?

A. After it dried up I think it was, yes.

Q. There wasn't any frost? A. No, sir.

Q. I was particularly referring to frost.

A. No.

Q. Is Bud Stevenson employed by you now?

A. No.

Q. He lives in Klamath, does he not?

A. I think he does now.

Q. Does Jim Stevenson live in Klamath?

A. Yes.

Q. Have you seen him of late?

A. No, I haven't seen Jim for over a year. I haven't seen Bud. I expect it has been a year since I have seen Bud.

(Deposition of A. G. Kirschmer.)

Q. Now, when you talk about giving authority to Bud Stevenson to sell the crop, what time of the year was that?

A. I doubt that I was the one that gave that authority.

Q. Well, when he was given authority?

A. It must have been about harvest. Hofues gave him authority to contract with Kerr-Giffard, because Kerr-Giffard wanted somebody that had authority to sign the contract.

Q. And at that time you knew, of course, that Mr. Barr's share had been assigned to myself and Mr. Horton Harmon?

A. I think Mr. Hofues knew it.

Q. Well, you knew it, didn't you?

A. I knew it.

Q. When you gave that authority, of course, that authority only pertained to your share of the crop? A. That is right.

Q. You weren't contracting for Mr. Barr?

A. No.

Q. Do you know who sold Mr. Barr's share of the crop? A. No, I don't.

Q. Do you have any idea, Mr. Kirschmer, how many acres were planted both including that area planted by Bud Stevenson and Mr. Barr?

A. Actually I am not quite that familiar with those different fields, unless I would just sit down and figure them up from a chart. I just don't know those fields that well. You see I have never been there except just visiting the place, never had anything to do with the operation.

(Deposition of A. G. Kirschmer.)

Q. What was the largest yield per acre that you have gotten there?

A. I think as good a yield as we ever got, Clay got off of that Fall plowing.

Q. Well, how much was that?

A. I believe it run up to 3500 pounds per acre, something around that.

Q. Mr. Kirschmer, I don't know much about wheat. How many bushels would that be?

A. Forty-eight pounds to the bushel, so that would make about just half that many bushels you see; it would be twice that many bushels, about seventy bushels to the acre.

Q. How much of the property produced that?

A. I judge about 650 acres.

Q. That was where the wheat was about four feet high?

A. The barley.

Q. The barley?

A. The barley was tall. It was the best part of the ranch.

Q. And if the whole ranch had been properly plowed, the Fall before, it would have produced about seventy bushels to the acre?

A. Well, it wasn't all that good.

Q. Well, how much would it average?

A. I think we would have had an average of fifty bushels to the acre. I believe we had. All of this alkali land would have produced more than it did, we know, because the alkali goes down when you plow it. When you put water on plowed land

(Deposition of A. G. Kirschmer.)

it seeps the alkali down when you plow it; but when you don't plow it, it stays on top.

Q. You say an average of fifty bushels to the acre, that would be——

A. That would be 2500 lbs., and they sell that per hundred.

Q. It would be about, 2500 acres would be, how much did we say, fifty bushels to the acre?

A. Fifty bushels to the acre, on 2500 acres, it would be 125,000 bushels.

Q. And what was the average price of grain then? Do you off-hand remember?

A. Well, the 1952 crop sold for \$4.10 a hundred and the 1953 crop sold for \$3.00 a hundred.

Q. That would have been around \$300,000, wouldn't it? A. Yes.

Q. That is what you expected to get?

A. We knew it could produce that.

Q. Well then, there was something wrong, either with the planting or the farming or harvesting or something was wrong around there, wasn't it, Mr. Kirschmer? A. Yes, sir, there was.

Q. Did Mr. Barr replant that area that was planted by Bud Stevenson?

A. No, it was too late.

Q. Well now, you said some of that land should have been leveled; was that land that you were speaking of that should have been leveled?

A. This land that they talked of irrigating isn't land that you can—it wasn't prepared for irrigation. Stevenson never irrigated it and it never was

(Deposition of A. G. Kirschmer.)

prepared for proper irrigation. You could irrigate it, but you know water, how water is, it runs around here and there and everywhere; you could have probably helped it some by irrigating, but you wouldn't have ever got a job. In order to get a job irrigating, you have got to put a float on that land and float it and prepare it so that when you put water on it it will spread, and that wasn't done; there was no time for it.

Q. You say Mr. Jim Stevenson did tell you it was necessary to irrigate?

A. Bud Stevenson.

Q. Oh, Bud, it wasn't Jim? A. Yes, sir.

Q. Mr. Kirschmer, does Mr. Hofues know any more, has he ever told you anything more than you have testified here? Does he know any more about this situation than you have testified to?

A. No.

Q. About the same?

A. He would know less about it. Let him read it and see if that suits him. I think I know more about it than he does.

Q. Well, we will consider that later.

A. Unless he has heard some conversation that I didn't know anything about.

Q. Now, at the time you arrived there in September, did you say you arrived there in September when the harvest was part way over?

A. We arrived there in early September when it was too early for harvest.

Q. Oh, pardon me.

(Deposition of A. G. Kirschmer.)

A. They had phoned us that harvest would start around between the first and the tenth, so we were going to be there in time. We waited around there two or three or four days, I think about the fifth, and then we seen it was still two or three weeks off and then went back home.

Q. Then when did you return, Mr. Kirschmer?

A. About the first of October.

Q. And at that time, how much of the area had been harvested?

A. They had been harvesting about ten days I guess, and they must of had two-thirds of it harvested.

Q. They had two-thirds of the——

A. Yes, all of two-thirds. I tell you, they had two-thirds of the acreage harvested and eighty percent of the grain or eighty-five.

Q. They had harvested the portion that Mr. Barr had planted? A. Yes.

Q. Is that what you mean?

A. That is right.

Q. What was that to be harvested?

A. When I got there they were harvesting on this tract that was discussed here earlier where I said I saw that fellow trying to harrow in the grain right after they drilled. That was close to the house. You see that was on the right hand side of the house as you go north, immediately after the pasture, and that is where they were harvesting when I got there.

Q. Now, looking north from the house and to the right was the patch of rye, wasn't it?

(Deposition of A. G. Kirschmer.)

A. Yes, rye, barley and oats. There were three different varieties of feeds planted there.

Q. What acreage would you say those weeds covered? Would you estimate it at 400 acres?

A. Yes, I presume they were weeds, and there were spots in there that wasn't weedy; there was a little grain there, but it covered about 400 acres of the little weedy patch, maybe a little less than that, because there was some plowing done.

Q. Was any portion of the area that was weedy harvested? A. Yes.

Q. Did it bring any——

A. They got a little off of it, I don't remember, it didn't amount to much. It was low grade. They had to take discounts on it.

Q. How much would you say, how many bushels per acre would you say you got there?

A. Oh, seven or eight bushels.

Q. Had those weeds not been there you would have got about an average of fifty, would you say?

A. No, not fifty.

Q. How much would you have gotten?

A. There wasn't no stand there. You see the grain died.

Q. But I say, had there been no weeds there?

A. If there had been no weeds there, I would have said sixteen bushels to the acre, probably, with that kind of a stand that was there.

Q. Well, you didn't see it when it was early before the weeds came up.

A. I seen it in the Spring. I was there, I seen

(Deposition of A. G. Kirschmer.)

it was coming up pretty fair in spots, but you see they didn't get it in the ground well enough to get a good stand, but it had a fair stand and it would have made some grain, it looked like when I come, but when Fall come and I got out there, I couldn't see nothing in a lot of places; there was nothing left there in places, and I am assuming the alkali killed it.

Q. Well, the weeds would have had something to do with it, wouldn't they, Mr. Kirschmer?

A. Well, the weeds, of course, can make it rough on grain, because they weathered that cold Spring there. That is why the grain they planted later, and the weeds wasn't there, because they had just come up and then planted, and naturally the barley had a chance then to fight with the weeds and probably would have won.

Q. When was this three weeks of cold that you spoke about, or do you remember?

A. Probably—there was one week in May that wasn't so bad, but after that it got bad, after the wheat come up it got cold and wet.

Q. Was the cold season over with by June 10th or 12th?

A. Yes, I think it was, as near as I can tell, I wasn't there, but I am assuming that was about it.

Q. And at that time you don't know what the stand of the grain was?

A. No, I didn't know, I wasn't there then.

Q. When did Mr. Barr dispose of or assign this contract that he entered with you for the leasing of this property which expired in 1963, dated De-

(Deposition of A. G. Kirschmer.)

ember 7, 1953? When did he assign that to the Farnams?

A. I don't know, I just heard of that about harvest time.

Q. Where are the Farnam boys now?

A. They are on the place, on the Meiss Ranch.

Q. How many acres did they plant last year?

A. I think they planted about all the acres that were prepared to plant. They didn't get it all in either. There was some left they just didn't work because of the alkali.

Q. Did you have a drouth—freeze-out this year?

A. Yes, it froze out this year.

Q. Completely?

A. Well, they harvested about \$55,000 worth of grain there, but you see what was the matter, the grain went down in grade. They had quite a few bushels, but it wouldn't grade No. 1 barley, so I think they had to sell it at about \$2.70, \$2.50 somewhere along there. It went down a lot in value and it went down in weight. If it don't weigh, you can't make growing barley out of it.

Q. When did it freeze, Mr. Kirschmer, this year?

A. They had one freeze they tell me in July, or June, one in June and one the twentieth of August, and that is the one that I think gave them their damage.

Q. About what proportion of the crop did they lose?

A. Well, every bit of it was damaged to the ex-

(Deposition of A. G. Kirschmer.)

tent of, at least to the extent of fifty percent.

Q. About fifty percent of the crop?

A. Fifty percent, yes, worse than that, I would say sixty-five percent of the crop was damaged from the freeze.

Q. And it was not only damaged, but—do you mean it died out completely?

A. I mean that it reduced the income to that extent.

Q. By sixty-five percent?

A. That is right. You see the boys had 2,000 acres of Fall plowing and that is why they had a wonderful chance to make a big crop.

Q. Where do the Farnam brothers live?

A. Before?

Q. No, now. A. They live on the ranch.

Q. Oh, they live on the ranch? A. Yes.

Q. How many acres in that whole ranch, Mr. Kirschmer?

A. Thirteen thousand two hundred acres.

Q. And how much of it was under cultivation?

A. Well, around a little over four thousand acres, I don't know exactly, something over four thousand acres.

Q. You say something over four thousand acres?

A. Yes.

Q. Would you say forty-five hundred?

A. I don't think it was quite that much.

Q. It was over four thousand? A. Yes.

Q. Between four thousand and forty-five hundred?

(Deposition of A. G. Kirschmer.)

A. Yes, between four thousand and forty-five hundred, that is where it belongs.

Q. When you arrived there, how many harvesters were running, or being operated, I should say?

A. Well, there was a self-propelled running, and it occurs to me two of those big twenty foot machines.

Q. Was Mr. Barr there when you arrived?

A. He was there at first, but he wasn't there when I left. He had left for home by that time. I tell you, he had two rigs running, at least when they could do it they would pull two combines, but I believe when they got in that weedy stuff they had to unhook that one, they just couldn't handle it; it would choke down.

Redirect Examination

Q. (By Mr. Kester): Just a few more questions: You mentioned during 1952 the crop produced about \$10,000 to \$15,000 more than it did in '53, is that correct? A. Yes.

Q. And I believe you also said that in '52 the price per bushel was \$4.10 whereas in '53 the price was \$3.00.

A. That is right, and oats was relative difference, about the same.

Q. So that the larger money return in '52 was primarily due to the better price in that year, wasn't it? A. Yes.

Q. Now, Mr. Kirschmer, Mr. Tonkoff asked you with respect to some ground that was plowed up because it was weedy? A. Yes.

(Deposition of A. G. Kirschmer.)

Q. Did you have any objection to that being done?

A. No, I never was much of a hand to try to harvest a crop that was half weeds and half grain, so I don't object to those things.

Q. Do you feel that that was a good farmer-like practice?

A. That was good practice.

Q. And that would preserve the land for the following year, wouldn't it?

A. Yes.

Q. Counsel asked you with respect to some ground that was cracked; where did that ground lie?

A. That was that hard gumbo land that cracked so bad.

Q. That was on what you call the fringe areas?

A. Yes, fringe and approaching the fringe. There was some of the flat land that is fairly hard, a little of it, as I remember it, it was kind of a break between the peet and the gumbo. It was kind of where she run together, and even that cracked pretty bad.

Q. The peet land down in the old lake bottom, that doesn't crack?

A. No, it don't seldom ever crack much; it might crack a little, but it is already spongy when it is dry, kind of spongy. That would burn, that peet land. You can set it afire.

Q. But it is primarily the gumbo land up around the edge that cracked when it is dry?

A. Yes, that is what they talked about irrigating. That is gumbo land.

(Deposition of A. G. Kirschmer.)

Q. Is that the same land that you said had not been prepared so that it could be irrigated?

A. It wasn't prepared sufficiently to do a volume job of irrigating, or a good job of irrigating; it would just be kind of a half irrigating job. It was somewhat on the discouraging order to try to do it. You could go at it and get some water on it, but it wouldn't make any money. It would just be kinda of a half way irrigating job, something on a discouraging order to try to do it. You could go at it and get some water on it, but it just wouldn't make, it wouldn't make any money. I tell you, it just wasn't set to irrigate that kind of a acreage, wasn't prepared.

Q. Suppose they had wanted to irrigate it, was there water available with which to irrigate it?

A. All they could have done was with lake water, and, of course, at that time, it was of questionable merit.

Q. In other words, the only water available was the lake water, and the lake water was so full of alkali that it couldn't be used, and there wasn't anything to irrigate it with?

A. Well, of course, I wasn't there to check the water, but that is the report we get on the water. By mid-season it gets so heavily alkalied that it isn't good practice to use it. The Soil Conservation and even the AAA Office have recommended not to use it.

That wasn't the big objection; the big objection is the lack of preparation for irrigation, lack of

(Deposition of A. G. Kirschmer.)

arrangement. Nobody had ever irrigated and nobody had ever prepared it to irrigate, and it was just a haphazard operation, the best you could have made of it. There was no pump there to pump any quantity of water. They could have pumped some water, sure.

Q. Has that been irrigated since then?

A. No, the boys didn't irrigate it.

Q. And during the eight years that Jim Stevenson had operated it, he hadn't irrigated it either?

A. There was no preparation made for irrigating. You could have irrigated a few acres, of course.

I am giving you my opinion, my exact opinion of the thing. I feel just like I am talking. I irrigate enough here to know what it takes to irrigate. You have got to be prepared to irrigate.

Q. Counsel asked you whether Bud Stevenson had said that the crop should be irrigated and you testified that Bud did say that it should be irrigated.

A. Yes, that is right.

Q. Did you also make inquiry of other people besides Bud Stevenson to find out whether it should be irrigated?

A. No, I called Clay and talked to Clay about it after I talked with Bud. Clay said he would go look into the feasibility of irrigating that acreage, but, of course, I realized when I talked to him there was no facilities there to irrigate a lot of ground, but I figured he could irrigate what he could get to with the one pump he had there.

Q. Did you ever talk to Jim Stevenson about the advice of irrigating? A. Yes.

(Deposition of A. G. Kirschmer.)

Q. What was his idea?

A. His idea was, there was very little merit to it, due to the fact that you generally catch frost on your crop if you irrigate it.

Q. Why is that?

A. It retards the maturity date.

Q. In other words, if you irrigated in the middle of the season you get a regrowth?

A. You get a regrowth, and the regrowth will retard the maturity. That is old Jim's philosophy.

Q. So then if you have an early frost and you are caught like they were this last year, you may lose it all; whereas, if you take a chance on not irrigating you will at least get a crop of some kind?

A. You will get what is there, which was nothing practically last year.

Q. Mr. Tonkoff asked you if a good farmer-like operation would mean spraying for weeds and I believe you said that it would; would that be true that the spraying of weeds would endanger the crop itself?

A. You would have to use a heavy amount of spray to kill a rather bad weed crop, yes, you are in danger of damaging your crop.

Q. In that event, would you say that it would be good farmer-like practice to spray for those heavy weeds and thereby endanger the crop?

A. I would say that if I had been out there, as I see it, if I had been out there in June and took a sprayer out there, commercial sprayer, and he would have told me that he was afraid that it

(Deposition of A. G. Kirschmer.)

would do more damage than good, I would have probably took his advice, or I might have come out the outside, put a light spray on it to hold the weeds in check and let what grain that was there try to make something; I might have done that. I wasn't there, so I couldn't say for sure, but I do know there is danger in putting a heavy spray on an anemic crop like that was to start, it was already anemic.

Q. In other words, it was a question of judgment there? A. A question of judgment.

Q. And somebody had to decide. The same thing is true of irrigation, it is a question of judgment and somebody has to decide?

A. Yes, because it was a question of judgment, there was no prior arrangement made for irrigation. It wasn't set up for it, and you could have irrigated, yes, but you would have had to have went in there in the field and made a lot of ditches, a lot of levies and surveyings. It was all too late for that after that come to the surface.

Q. And as one of the owners, you were satisfied with the judgment that was exercised, were you not?

A. Yes, I would say that under the circumstances I would have to be satisfied with them; I wasn't satisfied with the returns, of course, not, but I simply realized that it was an awful difficult operation after he got in there.

Q. Counsel asked you some questions with respect to what the yield might have been under the

(Deposition of A. G. Kirschmer.)

best of circumstances, you offered some figures, at one time I think you mentioned \$250,000. and another time you mentioned \$300,000, which you might have expected to get if everything had been the best. At the time Clay Barr went in there, did you have any expectation of getting anything like that?

A. I did figure it would make more than it did make, but I did figure that what he had planted was going to make something, but that didn't make nothing, so I was just naturally completely disappointed in every way.

Q. In other words, when Clay Barr went in there it was just a matter of salvaging what he could out of a poor situation?

A. It was just a matter of getting all done you can for the time of the year he went in, and then when he was held up by cold and wet weather longer, it just made a bad situation worse.

Q. I believe at one time you used the expression "Float the land," do you mean by that to level it?

A. Yes, they have those big land planes, they call them, and they set a blade at a certain depth at the high places. If that ground had been floated, and it carries dirt to the low places and picks it up which would have taken, you could have floated about ten acres a day, you could have probably done all right with it. Water can be spread if you will prepare it, but we wasn't prepared for it.

Q. Counsel asked you whether you have interest

(Deposition of A. G. Kirschmer.)

in that \$15,000. that Clay Barr assigned to you and you said you didn't. I am not sure that I understand what you mean by that. Do you recognize that this assignment to you of that amount is a valid obligation from Clay Barr to you to see that you get that \$15,000?

Mr. Tonkoff: We are reserving all of our objections now.

Mr. Kester: Yes.

Mr. Tonkoff: As to leading and everything else.

Mr. Kester: I think that we said at the outset that objections to the form of the question should be made now.

Mr. Tonkoff: Well, I object to that as being leading.

Mr. Kester: I will reframe the question then.

Q. Do you claim any rights under this assignment that Clay Barr made to you of \$15,000?

A. Of course, I don't understand the legal technicality of the situation, but when I said that I did not claim any rights in it, because Clay was up to date with his payments, and I presume I could hold it for security for further securing what he owes, but then I didn't feel that that was necessary.

Q. I believe you said that the note that you have from Clay Barr permits payment of any amount, does it? A. Yes.

Q. Now, when you took this assignment of the \$15,000. from him, did you treat that as an application on this \$24,000? A. That is right.

(Deposition of A. G. Kirschmer.)

Mr. Tonkoff: We object to that as leading and suggestive.

A. That is right, that is what I assumed that if he wanted to pay \$15,000. he had a right to.

Q. Did you accept on that basis? A. Yes.

Q. Did you mean by your testimony here before to renounce any rights you might have under that assignment?

Mr. Tonkoff: Objected to as leading and suggestive.

Mr. Kester: I think that question is all right.

Q. Did you intend to renounce any rights you might have under that assignment from Clay?

A. Yes, I think that is what I meant by when I felt it wasn't necessary for me to hold it for further collateral, that I was well secured.

Q. In other words, you say you feel that Clay will be good for it whether you get it out of the \$15,000 or not?

A. Yes, that is the way I looked at it. I really felt, speaking properly, that the thing was in litigation and all tied up and I just figured that I didn't want nothing to do with it.

Recross Examination

Q. (By Mr. Tonkoff): How much is the balance on that note? Do you happen to know, Mr. Kirschmer?

A. I think it is \$85,000. and interest from February.

Q. That is payable as you said, yearly?

(Deposition of A. G. Kirschmer.)

A. Yes.

Q. And Mr. Barr still owes you that on that note?

A. On that elevator note, yes.

Mr. Tonkoff: Mr. Kester, are you going to waive Mr. Kirschmer's signature?

Mr. Kester: Yes, that is all right with me.

Mr. Tonkoff: Are you going to make these a part of the deposition, these photostats?

Mr. Kester: If permissible, I would like to withdraw them to have them to work on, and I will make you copies of them if you want to have copies.

Mr. Tonkoff: Would you? I would appreciate it.

Mr. Kester: Would you note that on the deposition so that I don't forget it.

The Notary: I would be glad to have photostats made and attach copies to each copy of the deposition.

Mr. Tonkoff: That will be all right.

Mr. Kester: That will be all right, and you may attach the originals to the original copy of the deposition.

(Witness excused)

[Title of District Court and Cause.]

DEPOSITION OF FRANK KOFUES

The deposition of Frank Kofues was taken pursuant to stipulation at 12 o'clock noon, January 6, 1955, at the Sahara Hotel, Clark County, Nevada.

Appearances: J. P. Tonkoff, Attorney for Plaintiffs, and Randall B. Kester, Attorney for Defendants, Clay Barr and Betty Barr.

By Mr. Kester: It is stipulated that the deposition of Frank Kofues may be taken at this time and place as a witness on behalf of the defendants Barr before Martha M. Lundy, official court reporter and notary public of the State of Nevada; that all objections as to competency, relevancy and materiality may be reserved until the time of trial, but objections as to the form of the question should be made at this time. Either party may use the deposition in lieu of the testimony of the witness if he is unable to attend at the trial.

FRANK KOFUES

was called as a witness on behalf of the defendants Clay Barr and Betty Barr and after having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Kester): Mr. Kofues, the purpose of this proceeding is to ask you questions with respect to this lawsuit, the court reporter will take down the questions and answers, they will be filed with the Court. Under the rules of court you have

(Deposition of Frank Kofues.)

the privilege, if you wish, of reading and signing the deposition afterwards. However, we will waive the signature if that is all right with you.

A. Well, we won't have time.

Q. We will rely on the court reporter to take it down accurately. Would you state your name and address, please?

A. Frank S. Kofues. My legal residence is 6803 Lakewood Boulevard, Dallas, Texas.

Q. What line of business are you engaged in?

A. Investments.

Q. Are you acquainted with the ranch property known as the Meiss Ranch in Northern California?

A. Yes.

Q. Did you arrange to purchase that property in 1952? A. Yes, sir.

Q. From whom did you make the purchase?

A. Stevenson.

Q. Is that James?

A. James Stevenson.

Q. And after purchasing from him, did you bring A. G. Kirschmer in? A. Yes.

Q. And thereafter you and he carried out a contract of purchase from Stevenson, did you?

A. Yes, sir. I wish to make a slight correction. Mr. Higgins purchased from Stevenson and we purchased from him.

Q. Mr. Higgins is a real estate broker in Spokane, is he? A. Yes.

Q. When did you first become acquainted with the Meiss Ranch?

(Deposition of Frank Kofues.)

A. Oh, in the spring of '52.

Q. Did you look at it yourself or did you have—

A. No. Mr. Kirschmer.

Q. It was based partly on his report that you entered into the purchase? A. Yes, sir.

Q. Who was operating the place when you purchased it?

A. Mr. Stevenson and family.

Q. Did he continue to stay on in that vicinity for a time after you purchased it?

A. Oh, we employed his son, Bud Stevenson, to be our superintendent of operations.

Q. At the time you bought the property in 1952, had the crops already been planted?

A. Oh, yes.

Q. Did Bud Stevenson carry on with the harvest in the fall of 1952? A. Yes.

Q. Then did he continue on into the spring of 1953 to start preparation for the 1953 season?

A. Yes.

Q. Would you tell us what the situation was in the spring of '53 as far as you and Mr. Kirschmer were concerned with respect to the management of the ranch?

A. We were very unsatisfied.

Q. And generally speaking, without going into detail, what was the source of that dissatisfaction?

A. Incompetence.

Q. On the part of Bud Stevenson?

A. Bud Stevenson.

Q. Did you and Mr. Kirschmer then arrange for

(Deposition of Frank Kofues.)

Clay Barr to come in and take over the management? A. Yes, sir.

Q. What was the arrangement you made with Clay Barr?

A. A lease, crop lease on shares.

Q. About what time of the year, then, did Clay Barr start operating the ranch?

A. As I recall, approximately May 1.

Q. Did you personally visit the ranch at that time? A. Not to my knowledge.

Q. What was the situation about your personal participation in the operation of the ranch?

A. I left that up to Mr. Kirschmer, who is qualified to handle the farming, that was his business.

Q. Mr. Kirschmer was an experienced farmer?

A. Yes.

Q. Have you had farming experience yourself?

A. Oh, in a way, in a speculator's way but not in actual farming.

Q. So you left that up to Mr. Kirschmer?

A. Yes.

Q. Were you then personally familiar with the things that were done during the summer in the way of preparing for and making the crops?

A. No, not as much as I should have been.

Q. Now, at the time the lease was made to Clay Barr, were there some other outstanding leases to other people?

A. Yes, there was three other leases.

Q. What were those?

A. One to Ratliffe on a potato contract, one to

(Deposition of Frank Kofues.)

Lee Scarlett on potatoes, one to Noakes for the lease and option to purchase 800 acres, who was the tenant on the 800 acres from Mr. Stevenson.

Q. You have brought with you here the lease to Mr. Ratliffe, have you? A. Yes.

By Mr. Kester: I will ask that be marked for identification. (Exhibit marked by reporter as Defendant Barr's Proposed Exhibit A.)

Q. Is this a signed copy of the lease to Mr. Ratliffe? A. Yes.

Q. Was there a similar lease to Mr. Scarlett?
A. Yes.

Q. You don't have that with you at this time, however? A. No, sir.

Q. Did it provide generally the same type of things? A. Generally the same lease.

Q. About how much land was covered by the two leases for potato land?

A. Approximately 240 acres.

By Mr. Kester: We will offer this in evidence.

Q. That lease contained a provision that the lessors agree to provide irrigation, water, for the potato land? A. Yes, sir.

Q. Was there a similar provision in the lease to Scarlett? A. Yes.

Q. Did Noakes have any provision for water for the 800 acres that he was renting?

A. Yes, he had his own wells on that 800 acres.

Q. Were you personally familiar with the manner in which the water was allocated that summer?

A. I do not recall.

(Deposition of Frank Kofues.)

Q. Did you visit the ranch during the season of 1953 at all?

A. I believe I made one trip. I know I made one trip while they were preparing to harvest, and I am not quite sure whether I made a trip earlier.

Q. At the time you went there during the start of the harvest season, did you make any personal observation as to the condition of the crops, or did you feel that—

A. A large part of the land was grown up in weeds which I was unsatisfied with and I subsequently found out that it was not the tenant's fault, that the crop was improperly planted last season.

By Mr. Tonkoff: I move that all that latter part be stricken.

Q. By Mr. Kester: That weed patch that you spoke of, where did that lie with respect to the ranch house? Would you say approximately where it was; immediately north of the ranch house?

A. I can't say the direction; it is close to the other cultivated area.

Q. Was it between the dyke and the road which extended from the ranch house up into the cultivated area, or do you recall the lay of the land well enough to recognize?

A. Oh, I recall it is between the road and lake, the road and the levee around the lake.

Q. At the time Barr went in there in May 1953, what was the situation as far as expectation of a crop that year?

(Deposition of Frank Kofues.)

A. I expected a larger crop than we harvested. It was late in the season, though, when Clay went on the ranch.

Q. Was the reason for Clay going in there to salvage what could be done out of the operation?

By Mr. Tonkoff: Objected to as as leading and suggestive.

Q. By Mr. Kester: Well, put it this way: What was the particular occasion for Clay having to come in at that time of the year?

A. Well, it was improperly being farmed by our superintendent.

Q. Now, considering the conditions as they existed when Clay Barr went in there, did you, as an owner, have any criticism of the way Clay Barr operated the ranch that summer?

A. I was unsatisfied with the results of the crop. Subsequently I found out that part of the soil, a great portion, is not suitable for farming operation.

By Mr. Tonkoff: I move all the latter part of that answer be stricken.

Q. By Mr. Kester: As an owner of the property did you make an investigation of the nature of the soil there?

A. Subsequent to this crop?

Q. Yes. A. By Government reports.

Q. What did you find as to the character of the soil generally there?

A. It was not—the soil was not as good as I

(Deposition of Frank Kofues.)

was led to believe it was when I purchased the ranch, that is, portions of the soil.

Q. Do you still have an interest in the ranch?

A. Oh, yes.

Q. What is the present situation as far as the ownership is concerned?

A. It is on a contract of sale to Fornam Brothers.

Q. At the time the crop was harvested in '53 did you participate in the arrangements for the sale of the crop?

A. Well, Mr. Kirschmer handled the marketing of the crop. I participated in the results.

Q. Do you recall whether you personally signed any of the sale documents to Kerr-Clifford Company, or who signed them in your behalf?

A. I believe I helped market the crop with Mr. Kirschmer. Naturally we both signed the sale.

Q. The crop was sold to Kerr-Clifford Company? A. Yes.

Q. Did Bud Stevenson participate in the sale of the crops for your share of the crops?

A. I made the sale with Mr. Kirschmer direct myself at the Willard Hotel in Klamath Falls.

Q. That was to some representative of Kerr-Clifford who met you at the hotel? A. Yes.

Q. Now, are you in a position to be able to tell us anything about such matters as irrigation or operating the other technical aspects of the farming operation?

(Deposition of Frank Kofues.)

A. I would rather Mr. Kirschmer answer those questions.

Q. You left that all up to him? A. Yes.

Q. You were satisfied with Kirschmer's judgment on the situation, were you?

A. Oh, yes.

Q. And still are as far as that is concerned?

A. Yes, sir.

By Mr. Kester: That is all.

Cross-Examination

Q. By Mr. Tonkoff: Mr. Kofues, when did you first meet Barr?

A. Oh, I believe it was in '51.

Q. And at that time did you have any business transactions with him? A. Yes, sir.

Q. What was the nature of that transaction?

A. I sold him a grain elevator in Burlington, Colorado.

Q. What was the sale price of that elevator?

A. It was \$119,000 cash, \$100,000 note retained, and exchange for other properties and notes for the balance of the consideration.

Q. What was the total consideration for the building?

A. Well, it was really an exchange. I received a ranch near Kalispel, Montana, stocked with approximately 500 head of cattle, clear of debt.

Q. That was Mr. Barr's, was it?

A. Mr. Barr's, and another ranch close to Spo-

(Deposition of Frank Kofues.)

kane near Okanogan, and a note on a hardware and implement business in Walla Walla, Washington.

Q. The total amount of that sale was around \$750,000, wasn't it?

A. Figuring from the trade aspect the results of the deal have been more than satisfactory, that is, I traded the ranch for a hotel at Klamath Falls and made an especially good trade.

Q. You own the Willard Hotel? A. Yes.

Q. Now, the note Mr. Barr delivered you was in the sum of \$100,000? A. Yes.

Q. What interest did that bear?

A. I do not recall, I believe it was 5%.

Q. How was that payable?

A. Payable annually.

Q. What were the payments?

A. I do not recall.

Q. Well, has that note been paid?

A. It was—I sold it in current condition to Mr. Kirschmer at par.

Q. At par value? Now, after that, did you have any other transaction with Mr. Barr prior to the Meiss Ranch operation?

A. Well, I assisted Mr. Barr in obtaining a lease on the elevator.

Q. Then did you give Mr. Barr a lease on this ranch, this Meiss Ranch?

A. Yes, Mr. Kirschmer and I gave Mr. Barr a lease on this ranch.

Q. What was the term?

(Deposition of Frank Kofues.)

A. Ten years, as I recall.

Q. That lease commenced in 1953 and ended in 1963?

A. Yes, sir.

Q. He operated the ranch just that one year?

A. Yes, sir.

Q. You say now that the Fornam Brothers are purchasing the ranch from you and Mr. Kirschmer?

A. Yes.

Q. The sale price of that ranch to you was \$1,250,000, wasn't it?

A. When I purchased it?

Q. Yes. A. \$1,200,000.

Q. Then Mr. Kirschmer purchased a half interest?

A. That is right.

Q. Well, now, when was this transaction made with Fornam Brothers for the purchase of this ranch?

A. After the crop was harvested in 1953. Negotiations were entered into in the fall of 1953.

Q. Did you cancel Mr. Barr's lease?

A. Mr. Barr sold his lease to the Fornam Brothers and I rearranged the lease, the cancelled lease, and sold the ranch under conditional sales contract.

Q. Now, when did Mr. Barr's operation or his right to possession or his possession cease in 1953?

A. After the crop was harvested.

Q. What month would you say that was, Mr. Kofues, do you recall?

A. Well, let's see—latter part of October.

(Deposition of Frank Kofues.)

Q. Did you examine the crop prior to the time it was harvested?

A. No, I do not recall being up there.

Q. Did you examine any of the property at the time you visited at the time the crop was being harvested? A. Just casually.

Q. What portion of the crop was harvested when you visited the property?

A. Well, they were harvesting barley at that time.

Q. Did you see where the weeds were? You mentioned weeds.

A. Yes, there was a large patch where weeds took over the crop.

Q. About 400 acres, wasn't it?

A. Oh, I don't recall the exact amount of the acreage.

Q. Did you have any personal knowledge Mr. Barr had plowed up some of the crops during the summer of 1953?

A. I believe that Bud Stevenson called me and made some complaints of part of the land not being properly harvested.

Q. You mean irrigated, don't you?

A. Well, talking about the weeds being sprayed—not being sprayed, farmed.

Q. He did call you and complain the property wasn't sprayed? A. Yes.

Q. That was during the summer, during the growing season, was it not?

A. Yes, during the summer.

(Deposition of Frank Kofues.)

Q. That would have been along about in July?

A. I would say July or August.

Q. Now, at that time or at some other time during the summer, did you receive any complaints from Mr. Bud Stevenson, your superintendent, that the crops were not being properly irrigated?

A. He called me one time and complained about the crops being not properly irrigated.

Q. Weren't properly or were?

A. Were not.

Q. Do you remember about what time of year?

A. Well, it was late in the year, I would say August.

Q. In August? A. Yes.

Q. You hadn't seen the property up to August?

A. No.

Q. Or the condition of the crops? A. No.

Q. But your best recollection is that it was in August, is that right?

A. My best recollection.

Q. Could it have been in July?

A. I couldn't say.

Q. Do you know where Mr. Stevenson contacted you, as I understand you are all over the country?

A. I believe it was in Santa Monica.

Q. You didn't go up to examine the property?

A. No.

Q. Did you tell him anything about whether he should irrigate or not?

A. Well, I told him to take it up with Mr.

(Deposition of Frank Kofues.)

Kirschmer who was handling the operation of the farm.

Q. Do you remember about when you got up to the Meiss Ranch when the crops were harvested, what time of the year, what month?

A. I believe it was in October.

Q. Had most of the crops been harvested at that time?

A. No, I would say a fair portion of the crops.

Q. Did you see the condition of the crops that were not harvested?

A. I didn't go in the fields.

Q. For example, did you see some of the grain was about, oh, knee high?

A. No, I didn't go down in the fields to examine the grain.

Q. You didn't examine the condition of the soil? A. No.

Q. You didn't see any cracks in the soil by reason of lack of moisture?

A. I do not recall looking over the ground.

Q. There were other crops there grown of similar kind, other grain crops such as wheat, barley and rye, about the vicinity and about the ranch?

A. Yes.

Q. Did you happen to observe any of those crops? A. No, sir.

Q. What were your expectations per acre, the bushels per acre?

By Mr. Kester: Expectation as of what time in

(Deposition of Frank Kofues.)

1953? You mean in the spring or during the season?

A. I would say on the best land, 3000 pounds.

Q. By Mr. Tonkoff: That would be about 60 bushels, 65? A. About 50 dry bushels.

Q. That land is lake bottom, is it not?

A. The Government map shows all the classes of soil. I did not examine that when I purchased the land. I examined it after Mr. Barr made his crop.

Q. Now, you said that Noakes had an 800-acre lease? A. Yes, sir.

Q. And you say he had his own wells for his own irrigation? A. Yes.

Q. Did they have pumps or take the water out of the lake?

A. Electric pumps, shallow wells.

Q. So that he was not dependent upon the water that was available for the ranch for irrigation?

A. Very small part of it.

Q. That ranch contains about 14,000 acres?

A. About 13,000.

Q. What portion of that property has been cultivated or under cultivation?

A. I would say about 3,500 acres.

Q. And you had 800 leased to Noakes? There was an existing lease for 800 to Noakes?

A. Yes.

Q. And it had about 200 in potatoes?

A. Yes.

Q. So that left about 2,500 acres?

(Deposition of Frank Kofues.)

A. I think that is approximately right.

Q. Do you know how many acres were available for grain crops?

A. I thought the full 2,500 at that time.

Q. And were 2,500 acres planted?

A. That is what I recall.

Q. That property was capable of producing crops valued at about \$300,000, wasn't it, under ideal conditions?

A. That is what they claim, but it made a good crop one time to my knowledge. There was a frost failure this year.

Q. You say it made a good crop?

A. One time before we bought it. Very bad frost condition.

Q. You had no frost condition in 1953?

A. No.

Q. The growing conditions were ideal at that time? A. I understand.

Q. What were the big crops produced there that you know about, what did they bring?

A. That was when barley was at a very high premium value and that was, I think, two years before I purchased the ranch.

Q. What was the value?

A. I didn't see the results except Mr. Stevenson said it made a wonderful barley crop.

Q. Do you remember the amount of the proceeds?

A. I think it was around \$400,000, but barley was of high premium that year.

(Deposition of Frank Kofues.)

Q. That was in 1951 then?

A. Oh, I believe so.

Q. Do you have any pending transactions with Mr. Barr? A. No, sir.

Q. Your business relationship ceased after this transaction?

A. No, I was discussing a deal with him a few months ago. No, I am open to deal with Clay any time.

Q. That wasn't exactly that I was driving at. What I mean is have you had any other transactions with Mr. Barr since this ranch deal?

A. No.

Q. You don't have any now?

A. Very—we discussed a deal a couple of months ago.

Q. In other words, you are negotiating?

A. But it hasn't materialized.

Q. You are negotiating? A. Yes.

Q. Is that ranch property?

A. Trading a hotel I have in Montana for a farm which Barr operates in Washington.

By Mr. Tonkoff: That is all. Thank you very much.

Re-direct Examination

Q. By Mr. Kester: Counsel asked you about what you might expect of a crop on the ranch and you mentioned the possibility of maybe 55 bushels per acre.

A. That is on the best land.

(Deposition of Frank Kofues.)

Q. On the best land and under the best conditions? A. Yes.

Q. At the time Barr went in there in May of 1953 did it look as though the crop would be that good on the ranch?

A. I let Mr. Kirschmer work out the details. I do not recall going on the ranch at that time.

Q. So that 55 bushels per acre would be the maximum under best conditions, sir?

A. That is right.

By Mr. Tonkoff: That is leading and objected to.

By Mr. Kester: That is all. The document that has been marked, may it be stipulated that I withdraw that and make it available to you at any time?

By Mr. Tonkoff: Yes.

Notary Public's certificate attached.

[Title of District Court and Cause.]

DEPOSITION OF HORTON HERMAN

617 Spokane & Eastern Building, Spokane, Washington, Friday, September 30, 1955.

(Whereupon, at eleven o'clock, a.m., the above-entitled matter came on pursuant to subpoena duces tecum attached and notice of intention to take deposition filed with the Clerk, United States District Court, Eastern District of Washington, for the

(Deposition of Horton Herman.)

taking of the Deposition of Horton Herman before Oren J. Casey, Certified Shorthand Reporter, and a Notary Public.)

HORTON HERMAN

called as an adverse witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Tonkoff): Your name is Horton Herman? A. Right, sir.

Q. What is your profession? A. Lawyer.

Q. How long have you been practicing in Spokane, Washington? A. Since 1938.

Q. Of course you are licensed?

A. Right.

Q. Now, in 1953, who did you represent in the case of Welch vs. Clay Barr and Sterling Higgins, Cause No. 135666, an action filed in the Superior Court of the State of Washington, in Spokane County?

A. My partner, Bill Ennis, and I represented Clay Barr and his wife.

Q. At that time you and William Ennis were partners? A. Yes.

Q. And were officing where?

A. Paulsen Building.

Q. Now, do you have an amended complaint or the complaint on which we went to trial?

Mr. Kester: Perhaps I should make a record here. Is it understood that all objections are re-

(Deposition of Horton Herman.)

served until the time of trial? For example, if you are intending to go back into the history of that litigation I doubt its relevance or materiality, but I don't want to encumber the record with a lot of objections if you can reserve them all to the time of trial.

Mr. Tonkoff: Certainly, that is satisfactory with me. You are reserving all objections save as to form?—

Mr. Kester: Yes.

Mr. Tonkoff: —in order to save time?

The Witness: I think I have got it right here. No, that is your—I have the original—I mean a copy—of the complaint.

Q. (By Mr. Tonkoff): Well, Mr. Herman, would you examine that and see if that is the complaint upon which we went to trial?

A. Well, without reading it in detail, it appears to be, yes. There are some interlineations which I assume were those made—appears to be. I have no independent recollection of it.

Mr. Tonkoff: Mark that.

(Instrument handed the Reporter was marked Plaintiffs' Exhibit for Identification No. 1, Witness Herman.)

Q. (By Mr. Tonkoff): Plaintiffs' 1 for Identification. To refresh your recollection, we went to trial about the first part of June, did we not?

A. I believe so, of 1953.

Q. And during the course of that trial a settle-

(Deposition of Horton Herman.)

ment was arrived at between the plaintiffs and the defendants, was it not?

A. Yes, I believe so.

Q. And was that reduced to writing, Mr. Herman? A. Yes.

Q. Do you have the agreement?

A. I may have. I think there were two agreements.

Mr. Kester: Before you leave the subject of this complaint, I notice some interlineations, particularly in the prayer for damages. Can you advise me if those were amendments made or personal notes?

Mr. Tonkoff: Those were amendments made in Court on an argument of a motion. We amended in Court. Isn't that correct, Mr. Herman?

A. It could be. We met several times in Court.

Mr. Kester: This particular copy, was that the one from Mr. Tonkoff's file?

Mr. Tonkoff: Yes.

The Witness: Yes. That is the writing—the writing on that exhibit 1 is your writing, isn't it, Mr. Tonkoff?

Mr. Tonkoff: Yes, that is.

The Witness: I have here an original of an assignment, in answer to your question.

Q. (By Mr. Tonkoff): Is that from Mr. Barr and his wife? A. Yes.

Mr. Tonkoff: Will you mark that?

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 2, Witness Herman, for Identification.)

(Deposition of Horton Herman.)

Q. (By Mr. Tonkoff): Do you have the Trust Agreement? A. I don't know.

Q. It is entitled "Declaration of Trust".

A. I see several copies of it.

Q. Do you have a copy of it? That will be satisfactory if you have. That is it right there, isn't it?

A. No, this is Demand and Release. Well, apparently the only one I have is where they are combined. That is not a true copy. That is one that has been made later.

Q. You don't have an exact copy of it?

A. I thought I did have somewhere. I have got three files involving this.

Mr. Tonkoff: Mark this Exhibit 3.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 3 for Identification, Witness Herman.)

Q. (By Mr. Tonkoff): Examining Plaintiffs' Identification 3, Mr. Herman——

A. That appears to me to be a true copy of the Declaration of Trust which includes in it the assignment. Exhibit 2.

Q. You are talking about Exhibit 3, is that right?

A. That is right. It appears to me to be an exact——

Q. That was entered into on the 10th day of June, was it not?

A. I will have to see. That would be about the date. It is the date the instrument bears.

(Deposition of Horton Herman.)

Q. It was drawn in your office in Spokane, Washington here? A. Yes.

Q. Prior to the time the matter was submitted to the jury?

A. Yes. It never was submitted to the jury—the case.

Q. Now, in this assignment it provides for \$10,000.00 to yourself—second item under the Declaration. That sum was for what purpose, Mr. Herman?

A. I don't—The Declaration of Trust has an allocation of sums in it, not the assignment.

Q. Declaration,—pardon me.

A. And on page 3, the allocation to Horton Herman of \$10,000.00 was for services rendered Clay Barr and his wife in connection with the lawsuit.

Q. Which is the subject matter which is set forth in the amended complaint? A. Right.

Q. And the rest of the sums were allocated to the individuals named in the Declaration therein in the amounts specified, is that right?

A. Yes.

Q. Then subsequent to that time, prior to July the 9th, I requested you to go down to the Meiss ranch, which is in California south of Dorris, did I not? A. Well—

Q. To fly down there?

A. We had an agreement to fly down, yes. I was going to go with you but you went ahead. I couldn't make it at the time we agreed and you went ahead without me and then I never went down until a later time.

(Deposition of Horton Herman.)

Q. Well, you knew at that time that Mr. Barr had gone down with myself and Mr. Welch, did you not?

A. No. I knew that Mr. Welch had gone down. I thought ahead of you. And I don't have any definite recollection—you went down twice, I think, and Mr. Welch went down two or three times.

Q. Well, I am talking about prior to July 9th of——

A. ——of 1953.

Q. Yes.

A. No. I think the only time that I agreed to go with you was in about harvest time or something of that kind—in late August or September, it is my recollection.

Q. Well, at any rate, did I have a conversation with you after I returned from California?

A. From California?

Q. Visiting the ranch?

A. Yes. Yes, you did.

Q. At that time what statements did I make to you, Mr. Herman?

A. Well, my recollection is that you went to—twice down there.

Q. After the—After I returned the first time?

A. What statements did you make to me?

Q. Well, to refresh your recollection didn't I state to you that the property was not irrigated, not sprayed, not properly farmed?

A. I don't think—if you made those statements that wouldn't have been the first time. That would be my recollection.

(Deposition of Horton Herman.)

Q. That wouldn't be the first time?

A. No, it would be the second time that you were down there, if you made those statements.

Q. You have no recollection of me ever complaining to you about the farming operation?

A. Well, yes, you complained of the farming operation, but that was after the crop was harvested is my recollection.

Q. After the crop was harvested and never before? A. That is my recollection.

Q. Didn't I ever tell—Did I ever make any statement to you that I had moving pictures taken of the crop? A. Yes.

Q. Now, does it refresh your recollection that that had to be taken before the crop was harvested?

A. Yes, but I understood the movies were just taken to establish a condition; in other words, I don't think anybody knew the yield at that time.

Q. At any rate on July the 9th you assigned your interest to—under this trust—to Harvey S. Barr? A. Well, I assigned it at some date.

Q. Would this be a copy of that assignment which you mailed to me?

A. Yes, I think so. It looks like it.

Q. Well, you were the author of that assignment, weren't you?

A. Yes—I think actually Mr. Ennis drew it but I assigned it and if what you handed me—This is an original of it, I believe.

Mr. Tonkoff: Will you mark that Exhibit 4.

(Deposition of Horton Herman.)

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 4, Witness Herman, for Identification.)

Q. (By Mr. Tonkoff): Who is Harvey S. Barr, Mr. Herman?

A. He is the father of Clay Barr.

Q. And you disposed of your interest—\$10,000.00—to him for what amount?

A. \$7500.00.

Q. You were paid that money, of course?

A. Yes.

Q. That was a partnership fee, was it not, for you and Mr. Ennis? A. Yes.

Q. Now, what had happened that you sold that interest to Mr. Barr?

A. Well, he had been down there apparently to—It seems to me—At that time Clay Barr had a ranch around Mikkalo, Oregon—and that Mr. Barr had been down there and had seen the crop and he came in and offered me \$2500.00 because that, he thought, was a reasonable fee for my services. He thought that the \$10,000.00 was too much. So I said “No,” I said, “Mr. Tonkoff and I decided, to conclude this case, that we would gamble and I am willing to go ahead with my gamble on the crop.” And he, he came back again and offered five and I said “No”. And then he finally concluded the agreement. You were brought in on it—whether or not you were willing to take a reduction. And you finally said that you would. And I think you signed such a thing as I signed but it was never honored

(Deposition of Horton Herman.)

because, I think, when he came to see you or you went to see him or something, he said he didn't have any more money or something, I don't know what happened on that. He negotiated with me and I went to California about the 8th or 9th or 10th of July and he concluded that with Mr. Ennis, my partner, while I was down there.

Q. Did you go to the ranch at any time?—

A. No.

Q. —at McDowell, south of Dorris, California?

A. Well, I have seen the name, Dorris, but I don't know where the ranch is.

Q. Now, did you obtain the consent of any of the beneficiaries—principally John Cramer, Charpentier or Welch before you sold your interest to Mr. Barr?

A. No. No, I don't believe I did. You and I talked about it and you agreed to it, I know, but I didn't get the consent. I don't believe I even talked with them. I may have.

Q. Well, did you have any conversation with my office concerning citing some authority to you—two Massachusetts cases concerning the impropriety of an assignment of that nature without first obtaining the consent of the beneficiaries?

A. I think when the subsequent litigation came up that Bill Holst from your office wrote me a letter.

Q. "Subsequent litigation" did you say?

A. Well, that is my recollection. I don't—

Q. Do you have the original of that letter?

(Deposition of Horton Herman.)

A. The original from——?

Q. ——Holst?

A. I have a letter here to Horton Herman signed by Bill Holst.

Q. And what does that—Would you mind reading it? What date is it?

A. It says “Request of January 25th, 1954.” You asked me to resign as Trustee.

Q. No, prior to that time did you not receive a letter from Mr. Holst?

A. I think Mr. Ennis did. I didn't receive it. I think he did. But I don't—I remember, I think, talking to you once about it.

Q. At that time I advised you that the decisions were such that without the consent of the beneficiaries it would be improper for a Trustee to sell out his interest, did I not?

A. Well, you see, I took the position that I had a dual capacity with regard to that instrument—one as an individual and one as a Trustee. And I think that the Trust so spells them out. And you took the position that I had only one obligation under it and that was the one as a Trustee.

Q. Well, did you get my letter of—Did you read the letter of July 10th, 1953, written by myself to Mr. Ennis—your partner?

A. No, I don't believe I did.

Q. Is it in the file—the file that you have before you? Before you is the entire file of this case, is it not?

A. There are three files that I have before me.

(Deposition of Horton Herman.)

Q. You have the correspondence and documents?

A. I don't know whether I do. These are our complete files but whether it contains every one I don't know. I don't know; this happened sometime ago and I haven't examined it. I don't ever recall— You see, when I was in California Mr. Ennis took care of this final settlement with Mr. Barr and with you and he talked to you over the 'phone apparently. I wasn't there. I was gone for about—

Q. Do you have the original of that letter in your file?

Mr. Kester: May I see the copy?

The Witness: Yes, I do.

Q. (By Mr. Tonkoff): Would you let me see it, Mr. Herman? Mark that for identification.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 5 for Identification, Witness Herman.)

Q. (By Mr. Tonkoff): You have no recollection of me talking to you over the 'phone on June 30th about this contemplated trip to McDowell, California—to fly down with myself and Mr. Welch and Mr. Barr?

A. My recollection is it would not have been that early. My recollection is that our only interest in mine was at harvest time because—I won't say that we didn't talk about going down because I thought we had more or less a date for—it occurs to me that it would have been the 11th. By my recollection is that it was the 11th of September.

(Deposition of Horton Herman.)

Q. Well, subsequent to that time this action that is now pending was started in Portland?

A. Portland, yes.

Q. And you filed—You refused to join as plaintiff in that case, did you not?

A. Well, that is one way of putting it, yes.

Q. And immediately thereafter the original case was dismissed, was it not, in Portland?

A. I don't know about that. I believe you told me that that was the fact.

Q. Then you were requested to resign?

A. Right. I don't know the sequence but—

Q. Do you have a letter from Mr. Holst, my partner, asking you to resign?

A. Well, I have—I have some wires.

Q. Well, prefacing the wires, I personally asked you orally to resign here in Spokane; when I was here in Spokane I asked you, did I not?

A. Yes. Yes, you did.

Q. And at that time you advised me that you would not resign unless you were requested or demand was made of you to resign by the beneficiaries, isn't that right?

A. Well, you said "If you don't resign I will sue you to get you out of there".

Q. That is right.

A. That is what you said.

Q. Yes, that is right.

A. And I said "Well, if you share the view of all the beneficiaries, why, of course, I will resign."

Q. Then did you receive telegrams?

(Deposition of Horton Herman.)

A. Yes, I received telegrams from E. J. Welch, Roland P. Charpentier, Effie G. Charpentier and John W. Cramer.

Q. Do you have those telegrams with you?

A. Well, I have a copy. I assume that these are——

Mr. Tonkoff: Mark these 6 and 7.

(The instruments referred to were marked by the Reporter Plaintiffs' Exhibits Nos. 6 and 7 for Identification, respectively, Witness Herman.)

The Witness: And you requested me to resign as beneficiary and co-trustee.

Q. (By Mr. Tonkoff): Do you have the letter there from Mr. Holst?

A. I thought I did. I know that I received a communication from you or your office.

Q. I think you said you had it there a while ago, Mr. Herman?

A. Here, I think—is this the letter you mean? That is from you. The reason——

Mr. Tonkoff: Will you mark that one, too, that is number——

The Reporter: 8.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 8 for Identification, Witness Herman.)

Q. (By Mr. Tonkoff): You also have a letter there from Mr. Holst, do you not?

A. Well, I have one—or I have seen one. Yes, here is one right here.

(Deposition of Horton Herman.)

Q. Well, that isn't the one. That refers to your resignation though. That would be marked No.—

The Reporter: 9.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 9 for Identification, Witness Herman.)

The Witness: Here is another letter from him.

Q. (By Mr. Tonkoff): No, the one I am talking about is the one requesting or demanding your resignation?

A. I don't appear to have one in this file. Wait a minute. Well, I got such a letter but—I recall I got it from you, that you asked me to.

Q. Well, any kind of a letter?

A. I will admit I got such a letter. I don't see it.

Q. At any rate demand was made. You don't have the letter at the present time?

A. No, I apparently don't but I recall getting a letter from your office. I don't recall whether it was from you or Bill Holst asking that I resign, the same as your clients, Cramer, Charpentier and Mr. Welch had requested.

Q. And pursuant to that demand you did resign? A. Yes, that is right?

Q. Do you have a copy of that resignation, Mr. Herman?

A. Yes, here is the demand by you that I resign. It is included in the body of that demand. Is that what you meant?

Q. That is the release from you? Yes. Well, but other than that, you did—

(Deposition of Horton Herman.)

A. The other one has Welch's name. It ought to be bound together.

Mr. Tonkoff: Let's have that as one exhibit.

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 10, Witness Herman, for Identification.)

The Witness: Yes, here is a copy of my resignation.

Q. (By Mr. Tonkoff): You served that on all of them, did you not?

A. I think I served—Yes. Yes.

Mr. Tonkoff: Mark 11 and 12.

(The instruments referred to were marked Plaintiffs' Exhibits Nos. 11 and 12 respectively, Witness Herman, for Identification.)

Q. (By Mr. Tonkoff): Did you have any conversation with Mr. Harvey S. Barr when you resigned; did you have any conversation with him?

A. No, but I wrote him a letter.

Q. Prior to the resignation did you contact him and advise him of what was going on?

A. No, I wrote him a letter and told him I was resigning. I enclosed a copy of that demand and release.

Q. What was your basis on refusing to join as plaintiff?

A. I thought that any suit should be brought by the beneficiaries individually because my interpretation of the Trustee Agreement—That is my recollection now; I haven't made a re—re-examined or restudied the thing. That my obligation as Trus-

(Deposition of Horton Herman.)

tee was to disburse the money; that I felt that Mr. Barr had breached the agreement; that the beneficiaries had a cause of action.

Q. And the Trustees didn't?

A. No, I felt from what you stated, if your case facts were true, that the Trustee funds should not be subjected to interpleader demands for attorneys' fees and costs. As a matter of fact, at the time I set forth my views completely and sent you a copy of the letter on December 12, 1953.

Q. Is this the letter? A. Yes.

Mr. Tonkoff: Would you mark that?

(The instrument handed the Reporter was marked Plaintiffs' Exhibit No. 13 for Identification, Witness Herman.)

The Witness: That is the letter in which I asked that the sums be distributed immediately.

Q. (By Mr. Tonkoff): On December 12th, the date of Identification No. 13, you had already made your assignment to Mr. Barr, of course?

A. I think that was in July of—

Q. And you were then attorneys for Mr. Clay Barr? A. No.

Q. When did your relationship of attorney and client cease?

A. Well, as far as this case was concerned, it ceased as of the time the judgment of dismissal was signed.

Q. But you handled other matters for him, did you not?

A. It seems to me that in 1954—

(Deposition of Horton Herman.)

Mr. Kester: I think I should probably object to bringing in of any other attorney-client relationships.

Mr. Tonkoff: No, I am not asking about the—what you represented him in. I merely asked him if you hadn't represented him in other matters subsequent to the time of the termination of this lawsuit in Spokane?

A. I think one time he came and had Mr. Colborn in this office look at a lease or something in connection with another piece of property that he owns, but that is all.

Q. That was at what date?

A. Oh, I don't know. I would think that would have been in the fall of—might even have been this year, I don't really know.

Q. At any rate there was still an attorney-client relationship after the suit was started in Portland?

A. No, there was not. I would say "No, that I have no continuing relationship with him." I think this office did one piece of work in something unrelated to this case. I think Lyle Colborn did that in either the first part of this year or the last part of '54.

Q. At any rate were you not in an embarrassing position to be a party-plaintiff against your own client in Portland.

Mr. Kester: Well, just a moment. I don't think there was any evidence that he ever was any party-plaintiff.

(Deposition of Horton Herman.)

The Witness: I don't know specifically what time you are referring to?

Q. (By Mr. Tonkoff): At the time the suit was started and the time you said you didn't want the suit brought against Mr. Barr?

A. I didn't say that, Mr. Tonkoff.

Q. Well, you had no knowledge at the time of the truth or the facts alleged in the complaint?

Mr. Kester: I will object to the form of the question.

Q. By Mr. Tonkoff: Did you have any knowledge of our merits of our lawsuit against Mr. Barr, who was your former client? I will put it that way.

A. Not sufficient to decide that you were right or that he was. I felt that if there was any lawsuit based upon what I understood your statement of the case was, that the beneficiaries should bring it and not the Trustees and I so advised you.

Q. Did you have a conversation with Mr. Barr after I made complaints to you about the manner in which the crop was being grown down there?

A. I think I did, yes. I think I told him that you felt he hadn't farmed the place properly.

Q. And what did he say?

A. I don't recall specifically. He said that something——

Q. Well, I will put it this way. Did he deny that he was farming the property properly in a good farmer-like manner?

A. Substantially I would say that he denied any faulty farming practice over which he felt per-

(Deposition of Horton Herman.)

sonally responsible. I have known of the Barr family for a number of years and know that they are successful dry-land farmers, you see.

Q. Yes.

A. And I have been in on—Prior to this litigation, the case you brought on—I knew some of the machinery that he had in Oregon and I have some farm ground of my own and I have some familiarity with farming practices and how difficult it is sometimes. And I think you mentioned the same to me—that you were a fruit farmer and had been all your life, and some of the problems that arose down in your part of the country.

Q. I don't remember that familiarity. At any rate you had known the Barrs for several years past?

A. I had known of them.

Q. Had you represented them previously?

A. No, my acquaintance with the Barr family arose out of employment in Colfax when their son-in-law was killed. And I was employed by the County of Whitman to assist in the prosecution of a man named Rio that murdered one of the members of their family.

Q. When was that, Mr. Herman?

A. 1948 or '9.

Q. You have known them since then?

A. Lawrence Brown was their lawyer over the years.

Q. Did you know their farming operations over there by reputation and hearsay?

(Deposition of Horton Herman.)

A. I had been to their farm in Whitman County because that was the scene of the murder.

Q. But you didn't go there to examine the farming operations, I take it?

A. No. No, it was in connection with the scene of the murder that I went.

Q. Were you influenced any by your refusal to bring the action down in Portland or join in the bringing of the action by reason of your former acquaintanceship with Mr. and Mrs. Clay Barr?

A. No, that would have made no difference to me.

Q. Well, you said—Did you say that I had related to you some of the farming conditions down on the Meiss ranch which is the subject of this declaration of trust? A. Yes, you did.

Q. You related that to Mr. Clay Barr, you said?

A. I didn't. All I did was relate to him that you were dissatisfied and I understood that your dissatisfaction came when you found out how much money was realized from the crop.

Q. Is it your testimony that you never made any statement to him prior to that time?

A. I don't recall at this time that I did, no. I don't recall that I even saw him. It is my recollection that he lived in Oregon throughout all this time.

Q. Do you have any recollection of me calling you immediately after I returned back—returned from California and told you that the property was

(Deposition of Horton Herman.)

improperly irrigated and that insufficient water was put on the grain crops?

A. I remember you telling me something like that sometime. No, I don't remember when it was.

Q. Do you remember me telling you——

A. I remember you said you were dissatisfied with him and that you thought something to the effect that whether it was failure to put on 2-4-D on the weeds or whether it was failure to put water on or what the situation. My recollection is about the water about the time we all entered into this contract that there was a threat as to whether or not the water would flood it all out.

Q. Oh, where did you get that information?

A. I think from you, from Mr. Welch who had been down there.

Q. Do you recollect of a 'phone call being made there in the course of the settlement to discover what the condition of the crops were on the 10th of June?

A. I think Mr. Welch, I think, made such a call. I don't know. I think you told me that Mr. Welch and you—Mr. Welch knew of this ranch, having lived down there.

Q. You knew that you were going to get \$10,000.00 out of this?

A. I hoped to, yes. I did, the same as you hoped to get \$15,000.00.

Q. Did you expect to get the amount set forth in the Declaration?

A. I did if the crop came through. That is ex-

(Deposition of Horton Herman.)

actly my thought at the time and that is what you and I talked about and you agreed that was okay, with me, too.

Q. Your client—You made this offer and this allocation personally, did you not?

A. No, that settlement was made contrary to my advice to Mr. Clay Barr. He insisted that we make that settlement.

Q. That is true or may be true—

A. You know that that was what I told you.

Q. That is what you told me.

A. And you and I went on that basis.

Q. At any rate you and your client agreed to allocate those different sums to the parties named in the Declaration?

A. Yes, that is right. The agreement, I think, speaks for what our agreement was as I understood it.

Q. Well, the work that you put in this case you expected to be paid for it?

A. Yes, I agreed to try and defend that case for substantially less than I eventually realized.

Q. What was your value of your services in this case?

Mr. Kester: I object to that. It has no bearing in this case.

Mr. Tonkoff: He can answer that.

Mr. Kester: No.

Mr. Tonkoff: I insist on the answer.

Mr. Kester: Take it to the Court.

Mr. Tonkoff: Get this all in the record. The purpose of this answer is to discover Mr. Herman's

(Deposition of Horton Herman.)

view was of the \$10,000.00 that he expected to get and so conveyed for \$7,500.00.

Mr. Kester: My position is that the agreement speaks for itself; that any attempt to go beyond the agreement is irrelevant and immaterial. We do not deny that the agreement was made; we do not deny the legal effect of the agreement as it appears on the face.

Mr. Tonkoff: That isn't the purpose of this question. I will propound the question again. What was your estimated value of your service for defending Mr. Barr?

Mr. Kester: I will stand on my objection.

Mr. Tonkoff: Well, go ahead, we can still put it in the record.

Mr. Kester: I don't think it is necessary in that kind of question.

Mr. Tonkoff: Are you going to pass on it or the Court going to pass?

Mr. Kester: I told you if want a ruling; you know how to get the ruling.

Mr. Tonkoff: All right, we will get a ruling from this Federal Court if you want to stay here until next week.

Mr. Kester: Do whatever you like. This Federal Court in this district wouldn't have any jurisdiction over it anyway.

Q. By Mr. Tonkoff: You refuse to answer that question?

A. Well, what was the question — What my estimate of my value——?

(Deposition of Horton Herman.)

Q. What would have been your charge on this value had you not gone in and put in your fees on this wheat crop which was owned by your client?

A. I don't know.

Q. You haven't the slightest idea?

A. I have an idea but I don't know what they would have been.

Q. Would they have been \$10,000.00?

A. No.

Q. They wouldn't have been?

A. No. I was taking a gamble the same as you were on the crop coming in.

Q. I wasn't taking any gamble because it was estimated by Mr. Barr, was it not?

Mr. Kester: Now, just a minute. That is a leading question; it is argumentative and Mr. Tonkoff is not the witness. And if you want to testify we will put you under oath.

Mr. Tonkoff: I will be there, too. Put it all in the record.

Q. Was any statement made as to the value of that crop by Mr. Barr?

A. No, in my recollection, no. If you will recall, Mr. Tonkoff, that you and Mr. Ennis worked out or—I don't know whether Bill Holst came up or not—but you worked out substantially all of the details of the assignment and the declaration of trust, and I wasn't even present at nine-tenths of it.

Q. What was the purpose in re-assigning the

(Deposition of Horton Herman.)

crop then to Mr. Barr in accordance with that agreement after we were paid off the \$72,500.00, do you know? Did we have any discussion concerning that matter?

A. Well, I don't know, Mr. Tonkoff. I didn't think that I was a party to the case. You appear to be laying the ground work to bring such an action against me as a Trustee. But in any event—

Q. I am not bringing you any action—any action against you and I want to advise you. And I think you know me well enough by now what my reputation is. I am not laying any ground for bringing any suit against you whatever. We had a release and that was the end—good, bad or indifferent. I am merely asking you questions, Mr. Herman, in order to represent these beneficiaries as I think they should be represented. That is the purpose of my questioning.

A. Uh-huh. What was the question?

Q. I can restate it. Was there a discussion concerning the purpose of reassigning this crop to Mr. Barr after the \$72,500.00 was paid up?

A. I related the conversation with Mr. Harvey Barr.

Mr. Tonkoff: Do you have some of the exhibits?

Mr. Kester: No, I do not.

Mr. Tonkoff: Where is the exhibit on the Declaration of Trust? Pardon me for interfering with you, Mr. Herman. Where is the Declaration of Trust?

(Deposition of Horton Herman.)

The Reporter: We have 13 exhibits; that is all I know.

Mr. Tonkoff: We have a Declaration of Trust here somewhere.

Mr. Kester: It is Exhibit 3.

Mr. Tonkoff: Here it is. No, this is the Assignment. There is a Declaration there. You don't have it?

Mr. Kester: No.

The Witness: Here it is.

Q. By Mr. Tonkoff: In this Exhibit 3 it is provided that we would reassign—you and I would reassign Mr. Clay Barr and his wife the crop after we had received the \$72,500.00.

A. That isn't my understanding of the agreement. My understanding was Clay Barr would assign to us those proportionate shares to do with what we wanted to do. They were our's. And, as a matter of fact, if you recall, I recorded that assignment. We agreed that that would be the thing to do—to show an outright assignment of a proportion of the crop. I had it recorded down there in the County.

Q. Well, did we have any discussion as to the value of the crop when we made a provision in Exhibit 3, and it says: "It is agreed that at the earliest practical date, not in any event to be later than November 15, 1953, said crop to be sold up to the extent of Seventy-two Thousand Five Hundred Dollars net to the Assignees; and the Assignees shall upon the receipt of said sum endorse and

(Deposition of Horton Herman.)

deliver over to the Assignors all warehouse receipts, if any, representing any of said crops not so sold."? Did we have any discussion as the value of the crop when we made that provision?

A. I think there was some discussions as to values. Specifically I don't know. I remember this, that there is some question about whether or not it was barley or wheat or what type of a grain. And it was contemplated—I think you and I even talked about it—that if it went barley, that is, if the barley went for brewing purposes that the crop would be two or three-hundred thousand dollars. But we both realized and talked about it and that is why I think the 'phone call was made to satisfy that the water wasn't going to pour in there by your man, Welch, who lived down there.

Q. You say my man Welch lived down there?

A. He had lived there. That was my information.

Q. This conversation was in the presence of Mr. Barr, was it not?

A. That he lived down there?

Q. No. No, as to this crop would go into around a quarter of a million dollars?

A. No, I don't think so. I think you and I talked about it. You and I made the initial approach on this settlement. I talked to you at the Davenport Hotel and I said "I have got a client that I think is going crazy" or something to that effect. And I was of the opinion that you and I were in this to see if we realized the same as the clients.

(Deposition of Horton Herman.)

Q. Was there any reason, Mr. Herman, that we didn't take an assignment of the crop and call it quits—be satisfied with our settlement by taking the crop?

A. Why, yes, I think there was.

Q. What was the discussion?

A. I don't know. It appeared to me if the crop went over our agreement was to take less.

Q. If the crop went over this \$72,500.00?

A. That we were to take only the \$72,500.00. That was the maximum. If it went less we agreed to take less.

Q. Was there any doubt at that time as to what the crop would bring except as to controls, if the controls were out?

A. You are talking—Yes, of course, there is always doubt with a crop, and you know it.

Q. I am talking about the discussion we had?

A. Yes, there was lots of doubt. And you know it as well as I do.

Q. Just state what the discussion was?

A. Whether or not the water would flood that all out; whether or not there is all sorts of things that can happen to a crop. We even provided in there, as I recall, that there was no guarantee as to the yield. That was my recollection.

Q. Provide that there was no guarantee as to the yield? A. Yes.

Q. Would you find that in that document?

A. What exhibit—have you got the exhibit?

Q. Yes, Exhibit 3.

(Deposition of Horton Herman.)

A. On page 2 it says "It is understood and agreed that the assignors are not guaranteeing any particular yield." There were matters discussed. I think Welch wanted to go down there right away and look it over.

Q. And there was some mention, wasn't there, in our conversation at your office while we were drawing this agreement as to the amount that this 2800 acres would produce in dollars and cents?

A. No. No. The thing that I remember is this discussion about brewing barley and if it goes to brewing barley—I didn't even know that there was such a difference between ordinary barley and brewing barley, something like 3 or 4-dollars a ton as distinguished from—. Well, that wouldn't be right either. But four or five times greater value whether it would be brewing barley would constitute it. I don't know.

Q. You mentioned awhile ago I had made complaint to you about the failure to spray and failure to irrigate?

A. No, I said that I didn't recall what specifically you complained about but I thought it was one of those two.

Q. Do you remember me complaining to you about him having plowed up some of the grain?

A. No.

Q. Did you know that some of the grain was plowed up? A. No.

Q. Did you know that most of the grain was dry on this area?

(Deposition of Horton Herman.)

A. Well, I know this, Mr. Tonkoff—

Q. No—Did you know that, Mr. Herman? It is simple; you either did or you didn't.

A. I hadn't been down there; you had been down there. There was no occasion to me—The only thing that I recall that you ever told me was wrong in your opinion was either that the weeds hadn't been sprayed or that there was too much or too little water. Now that is my only recollection. And I remember saying this to you, Mr. Tonkoff,—something to the effect “Spray has to be put on in a very delicate stage in the Palouse country with which I am familiar”. And I said “I can't believe that the failure to put on spray seasonably right at the boot stage or just before the boot stage in a grain is in anyway a reflection on a farmer”.

Q. How did you know about how—about the grains and what—so forth down there, Mr. Herman, on the ranch? You had never been on it.

A. Well, prior to entering into the settlement there was some discussion as to whether or not there would be a crop on there, that you participated in. And you satisfied yourself having Welch call down there that there would be a crop on it.

Q. And didn't—And after Mr. Welch made a 'phone call in the course of this drawing of this agreement, prior to the time that it was drawn he did call down there, and the information that he received was that there was an excellent crop?

A. I don't know. You told me. You are the only source of information that I have from Mr. Welch.

(Deposition of Horton Herman.)

Q. Did you rely on me on the execution of this agreement and the declaration of trust and the \$10,000.00 that you were to receive? Did you solely rely on me—my information?

A. In what regard?

Q. As to the condition of the crop at that time?

A. Mr. Barr told me that there was a possibility of the water flooding it out and I was willing to take a chance for that kind of money that the water would not wash the crop out.

Q. And as far as you know the water didn't wash the crop out, did it? A. No.

Q. Well, now, this conversation was in the presence of Mr. Barr? A. Which conversation?

Q. Concerning the condition of the crop on June 10th of 1953?

A. I don't think so. I think it was just you and I.

Q. Do you recollect having any conversation up at the court house—at the elevator—in the presence of Mr. Barr, Mr. Welch, after Mr. Welch had made the call to Dorris, California?

A. No, I don't. My recollection is that—I don't say that there wasn't any such conversation, but I don't have any recollection of any substance like that.

Q. Where did we finally make up our minds to enter into this Declaration? Was it in your office or at the court house after the 'phone call was made?

(Deposition of Horton Herman.)

A. I don't recall that.

Q. You don't recall? A. No.

Q. At any rate did we have any information concerning the condition of the crop before we executed the Assignment and Declaration of Trust?

A. I understood you did.

Q. Did you rely on my information furnished you?

A. In part. In part, yes, because I was personally interested in the thing, having spent several weeks getting ready for trial and two or three days in trial. I wanted to have the same chance you did and the rest—of being paid for our work.

Q. Well, did your reliance on my word ever cease as to the condition of the crop down there?

A. No. As far as what was told me at the time I believed it to be true and that was that we had a good chance that this crop would come through and that we all would be paid.

Q. Do you know why the crop wasn't successful?

A. No, I have only the two things that you have suggested to me as being the reason why and I don't know which of those that you—

Q. Did Mr. Barr give you any reasons why the crop didn't amount to more than it did?

A. No.

Q. He has never referred to you—

A. No.

Q. —never made any statement to you—

A. No.

(Deposition of Horton Herman.)

Q. —why it didn't bring more than it did?

A. Well, I think that some statement was made about—I have this recollection, I don't know where it comes from, that there was a condition of frost in that area or cold weather, which is related of course to irrigating. I mean you could—I assume, I don't know anything about irrigation, but I assume that you could destroy a crop by irrigating or putting water on it when it was too cold. Now, I don't have any—something else may have been said but I don't—.

Q. When did you obtain that information about the crop being a failure due to the freezing?

A. I don't know that that was the thing—being a failure due to freezing. I don't know if it was a failure. And if it was a failure I don't know the cause.

Q. Mr. Herman, you have consulted with opposing counsel before the taking of this deposition?

A. They came in at ten minutes to eleven when this deposition was set for eleven o'clock, that is right.

Q. Did you have any discussion concerning your testimony? A. Yes, we did.

Q. Did you receive any correspondence or—

A. None.

Q. —or telephone correspondence?

A. No, with either the client of Mr.—I don't even know how to pronounce the gentleman's name.

Mr. Kester: It is Kester.

The Witness: Kester, no.

(Deposition of Horton Herman.)

Q. By Mr. Tonkoff: You have had no correspondence or conversation or communication of any kind with Mr. Barr? A. Not in a year.

Mr. Tonkoff: That is all.

Direct Examination

Q. By Mr. Kester: Mr. Herman, there has been marked for identification a letter which I believe is Exhibit 13 which you wrote to a number of people—Welch, Charpentier, Cramer—and more or less everybody concerned with this; you recall that letter, do you? A. Yes, I do.

Q. At the time that was written did that letter state your views with respect to your position as a Trustee in this matter?

A. My recollection is that it does.

Q. It is on the top of that file.

A. It may not state it too well but substantially it did. I felt that the moneys ought to be disbursed and that if Mr. Clay Barr was guilty of any breach of the contract that he should be sued for it and respond in damages if he had. I don't know whether I—

Q. Do you have available the file which relates to the first case that Mr. Tonkoff brought in the District of Oregon, No. 7268, the one in which he names you as a defendant and subsequently you filed a motion in that case based on an affidavit? Do you happen to have that before you?

A. Well, I have all the papers. If you could give me some idea—?

(Deposition of Horton Herman.)

Q. Yes. Your motion which was filed in January of '54?

A. Now, wait a minute——

Q. Perhaps I can refresh your recollection with my file copy. In case No. 7268 you filed a motion supported by an affidavit, and I would like to direct your attention to the latter portion of the affidavit, paragraph 8. I won't attempt to make this copy a part of the record because the original is available to the court in the original file of the court. In that portion of the affidavit you said in substance that you had no knowledge as to the merits of the case stated by Mr. Tonkoff but if there was a case that it should be brought by the individual beneficiaries and not by the Trustees. Is that a fair summary of that portion?

A. Yes, it is.

Q. Was that your view at that time?

A. Yes.

Q. And is that still your view with respect to the administration of this Trust? A. Yes.

Q. Now, this letter of December 12, 1953, which stated your view at that time——

A. What was the date of that affidavit?

Q. The affidavit was January 12, 1954. This letter of December 12, 1953, that has been referred to as Exhibit 13, does that still state your views with respect to how this Trust should have been administered? A. That is Exhibit 13?

Q. Yes.

(Deposition of Horton Herman.)

Mr. Tonkoff: Objection is reserved by both sides as I understand?

Mr. Kester: Yes.

The Witness: That is substantially—substantially sets forth what I did believe at that time and I still have that view.

Q. By Mr. Kester:: And is it not a fact that the only reason the Trust has not been administered in accordance with its terms and disbursed and the matters concluded as far as the Trust is concerned, the only reason that that has not happened is because of the claims made by Mr. Tonkoff and the bringing of these suits by Mr. Tonkoff?

A. Well, as far as I know. My position regarding the distribution is set out in this letter of December 12th and I think it should have been done. And that any suit for breach of contract certainly would be in the beneficiaries. And I have no knowledge of any other reason; if there is any other reason I don't know about it.

Q. Well, at the time you submitted your resignation as a Trustee which I believe is document marked Exhibit 12, did you then have the consent of Harvey Barr to resign as Trustee?

A. No.

Q. Did not Harvey Barr in fact object to your resigning as Trustee? A. Yes, he did.

Q. And did he not make that known by letter directed to you? A. Yes, he did.

Q. Do you have that letter available?

(Deposition of Horton Herman.)

A. I think so. I have got a letter that I mailed to him, Mr. Harvey S. Barr.

Q. And that is dated what?

A. Here it is. Here is the letter from Harvey S. Barr.

Mr. Kester: Would you mark these two letters, please? First the letter of January 26, 1954 and then the letter of February 5, 1954? First one will be marked Defendants' Exhibit No. 14 and the next will be Defendants' Exhibit No. 15, both for Identification.

(The instruments referred to were handed the Reporter and marked respectively Defendants' Exhibits Nos. 14 and 15, Witness Herman.)

Q. By Mr. Kester: Now, at the time you tendered this resignation and Harvey Barr objected to it, Harvey Barr was then a beneficiary of the trust, was he not?

A. Under my assignment, which is one of the exhibits, I believe, here. As far as I was concerned he had all the right, title and interest that I had.

Q. As beneficiaries?

A. As beneficiaries.

Q. Now, there was some conversation or some testimony earlier about Mr. Tonkoff also assigning his beneficial interest under the trust to Harvey Barr. Could you tell us whether that was done?

Mr. Tonkoff: The assignment speaks for itself and it is objected to.

(Deposition of Horton Herman.)

Q. By Mr. Kester: Do you have the assignment here?

A. Yes, I have an assignment. Mr. Tonkoff and I both signed the same instrument or a duplicate of the same instrument. But his was never carried out apparently.

Q. You have shown us a document bearing Mr. Tonkoff's signature, dated July 10th, 1953. That is what you refer to? A. Yes.

Mr. Kester: Would you mark that also.

(The instrument handed the Reporter was marked for Identification as Defendants' Exhibit No. 16, Witness Herman.)

Q. By Mr. Kester: You say his was not carried out. What do you mean by that?

A. I don't have any personal knowledge of that because all I know is, I think Mr. Tonkoff told me that Mr. Barr came down to Yakima to see him or something of that kind; that he talked with him anyway, and anything else that I would know about would be what Mr. Ennis told me. I was gone from the time from about July 9th. I was at a legal or law science institute in San Francisco.

Q. There was produced here I believe from your file—No, it was from Mr. Tonkoff's file a copy of the complaint in the action that was settled with this assignment. Do you happen to have a copy of the answer or any other pleadings that were in that case?

A. I think there were separate answers of the separate defendants.

Deposition of Horton Herman.)

Q. You were representing merely the Barrs?

A. Yes. What is that—an amended answer to an amended complaint? I don't know—I assume that is what the case went to trial on but I don't have any independent recollection.

Q. I am not familiar with your procedure here in Washington but I notice this starts out as a Sixth Affirmative Defense, would this be supplemental to some other answer?

A. It would if that was what it says. There is no reply. And here is an answer to amended complaint. Well, this yellow copy, answer to amended complaint, appears to have something written in pencil on page 4. So I don't know if that is one in which the case went to trial or not. Here is some sort of an answer of Sterling Higgins. It seems to me that these pleadings were finally determined before the court—time to try the case. That is all in this file.

Q. May we have these from your file also?

A. Yes.

Mr. Kester: Will you mark these? The Answer to Amended Complaint by defendant Sterling Higgins will be 17 and the Answer to Amended Complaint by defendant Clay Barr will be 18 and the Amended Answer by Clay Barr would be 19.

(The instruments handed the Reporter were marked for Identification as Defendants' Exhibits 17, 18 and 19 respectively, Witness Herman.)

(Deposition of Horton Herman.)

Mr. Kester: I will state to the record that in identifying these other pleadings in the original case I do so without waiving our objection to the complaint. If it may be offered on the grounds that the entire transaction is irrelevant and immaterial having been merged in the settlement agreement but merely so that the allegations of that complaint will not go unchallenged.

Q. Now, Mr. Herman, I take it that as a co-trustee under this original Declaration of Trust you, in the exercise of your discretion as a Trustee chose not to bring or join in the bringing of this action that Mr. Tonkoff brought, is that correct?

A. I decided, yes, to take no action one way or the other unless I was forced to.

Q. And, as you have stated, the principal reasons for that were, first, that you did not want to subject the Trustee to the expense of litigation and possible expenses of an inter-pleader?

A. That is right.

Q. And, second, that you felt if there was an claim that it was by the beneficiaries individually and that under the Trustee you would assume no affirmative position to sue or anything else except to pay over money?

A. My interpretation of the Trustee Agreement was we were to disburse the money while it was available.

Q. Were there any other reasons except those I have mentioned of a major nature?

A. No.

Deposition of Horton Herman.)

Mr. Kester: I think that is all.

Mr. Tonkoff: Just a couple of questions.

Recross Examination

Q. By Mr. Tonkoff: Exhibit 15 is the letter you received from Mr. Harvey Barr?

A. That is right, yes.

Q. And you say you are acquainted with Mr. Harvey Barr? A. Yes.

Q. And do you know who dictated this letter?

A. No.

Q. You haven't the slightest idea?

A. Not the slightest idea.

Q. It came dated February 5th after you had informed him of your resignation which is dated January 26, 1954?

A. That is right. I don't recall whether or not he was advised preliminary to that letter or my letter of January 26, 1954 that—

Q. I see.

A. Well, I could probably tell by reading the letter whether or not I advised him prior to that time. I don't know that I told him about it before his letter of January 26 because I had made up my mind that in view of all the circumstances that I was going to resign whether he insisted that I say or not.

Q. Why had you made up your mind to resign?

A. Well, I didn't want to put you through the trouble of suing me to get rid of me and I felt that the court would probably permit you on the ter-

(Deposition of Horton Herman.)

mination of the suit to do whatever you felt you had to do anyway.

Q. Did you file the affidavit in the first case in the Federal Court in Portland on account of Mr. Barr objecting to your resignation? A. No.

Q. You did that on your own?

A. Well, yes. You had made all kind of threats and accusations around here to me and I felt that I should put what I felt was my interpretation of the whole thing in an affidavit and file it.

Q. The threats and accusations were made after you had filed the affidavit in Portland, weren't they?

A. Well, I don't know what the time is of the filing. I don't know.

Q. Don't you have a recollection that that is what brought on the dispute and controversy between you and myself due to the fact that you had filed the affidavit in the first cause of action or in the first action that you filed in Portland?

A. Well, you first wanted me to join—I don't recall distinctly but as I recall you wanted me to join and I gave you the views that have been set out here and then you said "Well, I will name you a party defendant anyway". And I said "If you feel you must, go ahead and do it". And then some jurisdictional point was raised and you took the position that Judge Fee was wrong but none the less he was the Judge in the case. And my recollection is that the case was dismissed and then you blamed me for it and you came around making a

(Deposition of Horton Herman.)

bunch of accusations and I said "Rather than submit you to the difficulty", I said, "if you will get your people to demand my release and you demand it as a beneficiary why I will resign".

Q. And that was done, wasn't it?

A. That is right.

Mr. Tonkoff: I think that is all.

Mr. Kester: That is all that I have.

Mr. Tonkoff: Do you want Mr. Herman to sign this?

The Witness: I think I will read it and sign it.

Mr. Tonkoff: Can you do that in the next week or so?

(No response.)

(Whereupon, at 12:40 p.m., the taking of the deposition of Horton Herman was concluded.)

Notary Public's certificate attached.

[Title of District Court and Cause.]

DEPOSITIONS OF CLARENCE F. ENLOE
MARY E. NOAKES, JAMES H. NOAKES,
J. R. RATLIFF, JR.

It Is Hereby Stipulated by and between J. P. Tonkoff, of attorneys for plaintiff, and Randall B. Kester, of attorneys for defendants, that the depositions of Clarence F. Enloe, Mary E. Noakes, James H. Noakes and John Richard Ratliff, Jr., named in the Notice of Taking Depositions which

was served on opposing counsel on the 26th day of September, 1955, will be taken on October 7, 1955, at 203 Pine Tree Building, Klamath Falls, Oregon, before Vera L. Chase, a Notary Public and court reporter, after which testimony has been given the depositions will be reduced to writing and the original filed with the United States District Court for the District of Oregon, Portland, Oregon; that all objections are waived until the time of trial except as to the form of the question, and that either party may use said depositions at the time of trial subject to the Rules of Civil Procedure. In the event any documents are identified in connection with the testimony of any witness that the originals may be returned to the party identifying them after the Court Reporter has made photostat copies to be attached. It Being Further Stipulated that the signatures of the witnesses to said depositions be waived.

Appearances: J. P. Tonkoff, of Tonkoff, Holst & Hopp, attorneys for plaintiff, and Randall B. Kester, of Maguire, Shields, Morrison & Bailey, attorneys for defendants; and present, Clay Barr.

Whereupon the following proceedings were had:

CLARENCE F. ENLOE

a witness produced on behalf of the plaintiff, was examined and testified as follows in answer to questions put to him by the respective attorneys:

J. P. Tonkoff: Would you state your full name?

A. Clarence F. Enloe.

Q. Where do you reside?

A. Dorris, California.

(Deposition of Clarence F. Enloe.)

Q. How long have you lived in Dorris?

A. Oh, about 15 years.

Q. What is your occupation?

A. Well driller.

Q. Do you have any other occupation?

A. Farming once in a while.

Q. How long have you farmed in the area of Dorris, California? A. About 8 years.

Q. What kind of farming did you do?

A. General farming.

Q. Did that include grain? A. Yes.

Q. Are you familiar with a ranch commonly known as the Meiss Ranch? A. Yes.

Q. And have you had occasion to be on that ranch in the past? A. Yes.

Q. Did you happen to be on that ranch during the first part of July, 1953? A. Yes.

Q. Did you observe what crops were then growing there? A. I did.

Q. What did you observe?

A. Grain and potatoes.

Q. Could you briefly describe where that ranch is and what the general terrain is there?

A. It would be on the west side of Butte Valley.

Q. And is there any body of water on that ranch? A. Yes.

Q. What side of the ranch is that body of water on?

A. It would be on the easterly side.

Q. And do you know whether or not the water level is above or below the terrain of the ranch?

(Deposition of Clarence F. Enloe.)

A. It would be above part of it and below some of it.

Q. Going back to the time you observed the crops in the month of July, 1953, would you state what the condition of the soil was concerning moisture?

A. Very dry.

Q. Did you see anything on the ground that would indicate how dry it was?

A. There were cracks in the ground.

Q. About how wide? A. Oh, 3 inches.

Q. How long in length were the cracks?

A. Varied, irregular.

Q. On what portions of the property did you see these cracks?

A. Well, it would be near the spud field. I don't know.

Q. Would that be the north side?

A. It would be on the west side.

Q. Over what acreage did you happen to observe this condition of the soil?

A. I didn't walk around it, but I imagine 100 acres or more.

Q. Is that all the property you saw?

A. That's the part of noticed the cracks in, I didn't pay any particular attention to the rest of it. It was obvious.

Q. What was grown on that area?

A. Wheat.

Q. Did you inspect any of the barley, rye or oats?

(Deposition of Clarence F. Enloe.)

A. No, I didn't pay much attention to that.

Q. And the only portion of the crops you observed where you saw the cracked ground was the wheat field? A. Yes.

Q. Have you farmed any land in the immediate vicinity of this ranch?

A. In the upper end of the valley.

Q. About how far would that be away?

A. 11 or 12 miles.

Q. Are the climatic conditions the same?

A. Approximately the same.

Q. Do you know what type of soil the ranch consists of? A. Lake bottom.

Q. Is that rich or poor soil? A. Rich.

Q. Can you,—is it necessary to irrigate?

A. Very much.

Q. Can you grow a crop without irrigation?

A. Not a very good one.

Q. And were you familiar with the season of 1953? A. Yes.

Q. Would you tell us what kind of a growing season it was?

A. It was a very good growing season.

Q. When were the crops ready for harvest,—when was the harvest season begun in 1953?

A. In the month of August.

Q. What part of August?

A. Oh, from—any time after the 10th.

Q. And, Mr. Enloe, are you familiar with the production under favorable farming conditions, and

(Deposition of Clarence F. Enloe.)

particularly the conditions that existed concerning wheat and climatic conditions in 1953?

Mr. Kester: Of what.

Mr. Tonkoff: Grain crops.

Mr. Kester: On what ground?

Mr. Tonkoff: On the Meiss Ranch and the immediate vicinity.

A. Depends on what you were growing.

Q. Generally with all crops, but I will ask you in detail. The question is, are you familiar with the production on this property? A. Yes.

Q. Under conditions such as 1953, and on the land you know there on that Meiss Ranch and vicinity, could you tell us about what production you would get in wheat?

Mr. Kester: Just a minute. I am going to object to that. There is no foundation laid to qualify for an expert opinion.

Mr. Tonkoff: Have you raised wheat, barley, rye and oats in this vicinity? A. Yes.

Q. And in the immediate vicinity of the Meiss Ranch? A. Within 10 or 11 miles.

Q. Are the climatic conditions the same?

A. Yes.

Q. Is the soil the same? A. No.

Q. What is different?

A. The Meiss Ranch is better soil.

Q. And by your experience in raising grain crops, do you know what the production on the Meiss Ranch is under favorable weather conditions?

A. Approximately.

(Deposition of Clarence F. Enloe.)

Q. What would you say the production of wheat would be on that land, if properly irrigated?

A. 2500 pounds, or better.

Q. And what would oats,—is that per acre?

A. Yes.

Q. What would oats produce per acre under like conditions?

A. 2000, approximately.

Q. What would rye produce?

A. From 1200 pounds on up.

Q. Did I ask you about barley?

A. No.

Q. What would be the barley production?

A. 3000 pounds or better.

Q. Did you have occasion to go on the east side of the ranch and west of the lake there?

A. East side?

Q. West of the lake and east of the ranch.

A. Well, I was out there several times.

Q. While you were out there did you notice the condition of the crop, concerning weeds?

A. Just this one field.

Q. How many acres did that consist of?

A. I really don't know, about a couple of hundred acres, or possibly more.

Q. Would you describe the condition of the crop where the weeds were?

A. I didn't pay too much attention, there was a lot of weeds.

Q. Could it be harvested under the conditions?

A. I don't think so.

Q. Do you know whether that area was harvested?

A. I don't know.

(Deposition of Clarence F. Enloe.)

Q. What do you do for weeds when you observe they are coming up through the grain?

A. I spray for them.

Q. Is that a practice among the grain growers here? A. Common practice.

Q. How long has that practice been in existence?

A. I don't know, quite a long while.

Q. Do you know whether or not this area was sprayed, of your own knowledge?

A. I don't know.

Q. I omitted to ask you, Mr. Enloe, what was the size or height of the crop where you saw the dry land where it was cracked?

A. Approximately, oh, 8 or 10 inches.

Q. Have you observed crops growing in that area prior to this time when the ground wasn't dry?

A. Yes.

Q. At the same time of year have you observed crops, and in other years during the same period of time? A. Yes.

Q. How high were they?

A. Waist high.

Q. In your opinion, and experience as a grain grower, would you say the crop was cultivated and grown in a good farmerlike manner, consistent with the standards in this vicinity? A. No.

Mr. Kester: I want to enter an objection, there is no qualification shown, and second it calls for a conclusion, and is not a proper subject for expert testimony.

(Deposition of Clarence F. Enloe.)

Mr. Tonkoff: Will you read the question?

(The reporter read the question, beginning on the third line above.)

Q. Now, during or just prior to harvest, do you have any difficulty with geese and ducks taking any of the crops? A. In that vicinity, yes.

Q. Particularly, does that condition exist in the vicinity of the Meiss Ranch?

A. Yes. I wasn't there at that time.

Q. I wasn't asking your observation but just generally is there any danger of the ducks and geese getting the crops? A. Yes.

Q. Is there any reason why the Meiss Ranch is more subject to that trouble than any other place? Has the water got anything to do with it?

A. Yes, I believe it would have.

Q. One more question, when you observed this dry area did you observe whether or not there was water in the lake? A. Yes.

Q. Was there any water available for irrigation?

Mr. Kester: I will object to that. There is no showing made of his knowledge whether water might have been available.

Q. How full was the lake? A. Very full.

Q. There was some of that lake above the terrain of the ranch? A. I think so.

Q. Was there an abundance of water to irrigate that property? A. Yes.

Mr. Tonkoff: That's all.

(Deposition of Clarence F. Enloe.)

Cross Examination

By Mr. Kester:

Q. Mr. Enloe, just when was it you were on the ranch in 1953?

A. From February until the latter part of July.

Q. All that time?

A. I was drilling some wells there.

Q. Where were you drilling wells?

A. I was drilling wells to get rid of the surplus of water, repairing wells.

Q. Whereabouts were you drilling wells?

A. On the east side.

Q. The east side of the ranch, east of the lake?

A. Yes.

Q. That's quite a distance from the cultivated part, is it not? A. Yes.

Q. Clear across the lake? A. Yes.

Q. From the area where you were drilling the wells, you can't even see the crops?

A. I drilled on the west side, also.

Q. The west side of the lake or the ranch?

A. Ranch. On the tillable part.

Q. On the west side. What was growing where you were drilling wells?

A. Grain, potatoes.

Q. You were drilling wells in the potato area?

A. Not right in the potato patch, on the edge.

Q. And your concern merely was to drill wells?

A. That's right.

(Deposition of Clarence F. Enloe.)

Q. You had nothing to do with the farming part of the ranch? A. No.

Q. By whom were you hired?

A. Mr. Stevenson.

Q. Bud Stevenson? A. Yes.

Q. When did he hire you?

A. In February.

Q. Did you start to work immediately?

A. Yes.

Q. You say you were in there about how long?

A. Until the latter part of July.

Q. Could you give us an approximate date a little closer than that?

A. It might have run up into August, I don't remember exactly.

Q. The wells were for drainage, were they?

A. Some for drainage, some for irrigation.

Q. The drainage was necessary because there was too much water in certain areas?

A. That's right.

Q. And too much water is very damaging to grain crops. In fact, if it touches the stem it will damage the crop?

A. No, I don't think so.

Q. If grain stands in water it will damage the crop, so it is important to get the water off, isn't it?

A. If it stands very long.

Q. The wells you were drilling for irrigation purposes, where were they?

A. Northeast, one, and one,—let's see, in the northeast section, and it would be west and south of

(Deposition of Clarence F. Enloe.)

the lake, not very much south, more west than south.

Q. You mean around the ranch houses?

A. Yes.

Q. And you spoke about there being a lot of water in the lake at that time. What was the need for wells if there was water in the lake?

A. Their future program.

Q. As a matter of fact, the water in the lake has such high alkaline content it is not suitable for irrigation, is it?

A. That I don't know.

Q. So when you said there was a lot of water for irrigation you were not taking into account the quality?

A. No.

Q. You have never seen any tests?

A. Its been used, I know that.

Q. But you have no personal knowledge whether it is suitable?

A. No.

Q. Now, referring to the area on the west side you said was dry, is that what is normally referred to as dobe?

A. No, this was out in the deep soil.

Q. Was it area that was in crops or pasture?

A. Crops.

Q. Growing wheat, I think you said.

A. Yes.

Q. And that area is higher than the bottom land where the oats and potatoes were growing, isn't it?

A. Possibly some of it in, and some of it is on the level.

(Deposition of Clarence F. Enloe.)

Q. Isn't it up around the edge of this former lake bed?

A. It would be right on the edge, I imagine.

Q. At the time you—were you working over on that area on the west side?

A. Right south of the potato field, a little bit west of that wheat field.

Q. You were south of the potato field, as I understand it.

A. Yes. A little west, not much.

Q. The area you spoke of that was dry was northwest of the potatoes, wasn't it?

A. West.

Q. Straight west? But a distance of nearly a mile from where you were drilling wells, wasn't it?

A. Approximately.

Q. Did you notice in this wheat ground you say was cracked whether there had been any levelling done for the purpose of irrigation, were there any ditches?

A. Mr. Stevenson had pumped water up there several times. That's how come I was out in the field. I don't know where the water was going.

Q. Were you working on the pump?

A. No.

Q. What was the purpose of your trip?

A. Just riding along.

Q. And at that time they were pumping water on that same area?

A. I don't know where it was going, but it was going out of a ditch into a higher ditch.

(Deposition of Clarence F. Enloe.)

Q. You didn't see where the water was coming out on the ground? A. No.

Q. So you don't know whether that was even the same area where the wheat was growing?

A. It was the same area north of the potato field and grain field.

Q. Northwest of the potatoes? A. Yes.

Q. The area you saw you say was cracked, had that ground been leveled for irrigation?

A. I don't know whether it had been leveled or not, but it was bottom land, it was level.

Q. You say it was level? A. Yes.

Q. Were there any ditches there for irrigation purposes? A. Yes.

Q. Just when was it you made this trip and this observation you spoke of?

A. Fore part of July.

Q. And your testimony about the ground being dry and cracked is based upon this one trip with Mr. Stevenson? A. Yes.

Q. That's the only time you observed that condition?

A. No, I was there several times. I didn't pay any attention to it except it was rather obvious. I had no interest in it, I didn't pay any particular attention, anybody would notice that.

Q. Was that a subject of conversation between you and Mr. Stevenson? A. Later on.

Q. At the time you observed it? A. Yes.

Q. What was said?

(Deposition of Clarence F. Enloe.)

A. Oh, I don't remember the exact words. I asked him how come, I imagine.

Q. You are just guessing now, you don't actually recall what was said?

A. I wouldn't know the exact words. You would naturally make some comment on it, it would be the natural thing to do. What actually was said, or what he answered, I couldn't tell you.

Q. Did Mr. Stevenson say anything about what he was pumping water on, even though you couldn't see it? A. I don't remember exactly.

Q. What was the purpose of the trip, look at the pump?

A. Just riding around to see the potato crop, naturally we had to go through this grain field, that's where the road went.

Q. You were just making a little sight seeing trip, then? A. Yes.

Q. But didn't Stevenson say what the purpose of the trip was?

A. He didn't say nothing. Just going out there and start up the pump, that was all.

Q. You say you observed that area on other occasions. Can you identify those occasions, the time, or what you were doing?

A. Well, I made quite a number of trips out through there, looking the crops over, once in a while ride over with him to start the pumps, pump out the drain ditch into the lake, various things,—riding around.

(Deposition of Clarence F. Enloe.)

Q. But this observation testimony now is based primarily on this one trip you went to start the pump that you spoke of? A. Yes.

Q. The question of when to irrigate and how much to irrigate involves the exercise of judgment of the farmer operating the place, doesn't it?

A. I didn't hear you.

Q. The question of when to irrigate and how much to irrigate involves the exercise of judgment on the part of the farmer making the decision, doesn't it? A. That's right.

Q. He takes into account the season, the condition of the ground, the soil? A. Yes.

Q. And isn't it a fact if you irrigate late in the season you will get a regrowth? A. Yes.

Q. And delay the harvest? A. Yes.

Q. And if there is an early frost, you take a chance of getting caught by frost? A. Yes.

Q. And the more delay in harvesting, the more chance of getting caught by the birds, isn't there?

A. Yes.

Q. Because most of the birds come in from the north in the fall, do they not? A. Yes.

Q. Likewise the question of spraying, and when, involved an exercise of judgment?

A. That's right.

Q. And it involves the particular growth of the grain? A. It should.

Q. If you spray too young you may kill the grain? A. No.

Q. Doesn't it sometimes happen by the time the

(Deposition of Clarence F. Enloe.)

grain is big enough to stand the spray, then the weeds are too big to be caught by the spray?

A. Say that again.

Q. Put it this way. Doesn't it sometimes happen that if the grain is big enough to withstand the spray, the weeds are too big to be killed by the spray?

A. That would be the content of your spray that would determine that.

Q. Then that's a question of judgment of the farmer to decide whether its safe to spray?

A. Yes.

Q. When these alkali weeds get big it takes an awful lot of spray?

A. When they get that big there's nothing but weeds.

Q. Wasn't that the condition down there, the weeds were so far ahead of the grain spraying wouldn't have done any good?

A. That's right.

Q. The only thing to do is plow it up for summer fallow?

A. That would be up to the farmer.

Q. Isn't it also true in that country unless the land is prepared in the fall you don't get as good a crop next year?

A. Not necessarily.

Q. Do you recall the weather in '53?

A. It was very good.

Q. It was a late wet spring, wasn't it?

A. That was one of the best years. I had a man working for me, dry land, the best year he had.

(Deposition of Clarence F. Enloe.)

Q. You are saying now this wasn't dry land farming, should have irrigated?

A. No. You understand I am not farming this place. You are farming it, I'm not farming it.

Q. Mr. Tonkoff is the one trying to make you farm it.

Mr. Tonkoff: All I ask from this man is what he saw.

Mr. Kester: You asked him to express expert opinions.

A. You are going into the farming.

Mr. Kester: Then what we get down to is this,—many of these questions involve so much judgment you wouldn't attempt to second guess the fellow running it?

A. Its general practice all over the valley. You can tell whether a fellow is farming like he should.

Q. Do you have any information as to when the operator could get into that ranch that spring?

A. No.

Q. Or what he found on that place?

A. No.

Q. Isn't it a fact in the spring it rained so much the machinery got bogged down in the mud?

A. Its possible.

Q. There was so much water in the lake there was a real hazard from the dike breaking and flooding the rest of the ranch with lake water?

A. That I don't know.

Q. Did you observe what the water level in the lake was in respect to the top of the dike?

(Deposition of Clarence F. Enloe.)

A. It was full.

Q. And a storm or high wind would have taken the water right over the dike in the early summer?

A. I don't know.

Q. The area you describe as being dry and cracked is about 100 acres?

A. Approximately. I didn't walk around it, just drove through it.

Q. And aside from that hundred acres, you didn't pay any particular attention to the rest of the ranch?

A. No, except this other field on the way to the pump.

Q. That was the weed patch?

A. Yes. I don't know how many acres in that.

Q. That was between the dike——

A. Between the lake and the potato patch.

Q. Have you ever seen any tests showing the nature of the soil on the Meiss Ranch?

A. No.

Q. You don't know anything about its alkaline content? A. No.

Q. When you say the Meiss Ranch had better soil than some other ranch, you don't really know the chemical content of the soil?

A. No, but I've seen some awful good crops on it.

Q. Isn't it a fact in lake bottom lands the alkali get more and more, so that it gets to be a real problem in years to come?

A. That depends upon the operator.

(Deposition of Clarence F. Enloe.)

Q. But alkali is something he has to contend with? A. Yes.

Q. That's one of the reasons you are trying to drain the land, it helps the alkali? A. Yes.

Q. You gave some estimates on the production of grain crops. What years were you referring to that that type of crops could be grown?

A. That particular year, and previous years. The average of the whole community.

Q. In '53 can you tell us what ranch raised 3000 pounds of barley per acre?

A. The ranch I used to have.

Q. Where is that?

A. In the north end of the valley.

Q. Is that what you are basing your estimate on for production of the Meiss Ranch?

A. Yes. The Meiss Ranch as a whole, the years I have known the Stevensons their production has been generally more.

Q. Was there ever a good grain crop on the area you describe as the weed patch?

A. No.

Q. You don't know that area has ever produced a grain crop?

A. I don't know if it was ever farmed or not.

Q. These estimates you have given of production, that's sort of an average of the area? You don't take into account particular fields?

A. I don't know whether that was the county average or not, but that's the average in that valley where they irrigate.

(Deposition of Clarence F. Enloe.)

Q. You don't take into account conditions in a particular field. That's the average of good, bad and indifferent, all lumped together, for instance?

A. Yes.

Q. For instance, on your own place you have fields where you don't get as much as other fields?

A. Yes.

Q. In that year you probably had a field that didn't produce as much.

A. Yes, but your good fields will go much higher than that.

Q. What I am getting at, its a general average of lumping the good and bad together?

A. Yes.

Q. You wouldn't expect to get a crop like that off the land next to the dike so full of weeds?

A. No.

Q. I think you said you started there in February, is that right?

A. Yes.

Q. At the time you started the ranch was being managed by Bud Stevenson?

Mr. Tonkoff: Objected to as immaterial.

A. Yes.

Q. Do you recall about the middle of May the management of the ranch changed?

A. I don't know anything about it.

Mr. Kester: I think that's all.

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Enloe, you say you were there from February until when?

(Deposition of Clarence F. Enloe.)

A. Latter part of July, or August.

Q. On how many occasions did you ever see Mr. Barr present on the ranch?

A. I saw him there once.

Q. When was that?

A. Let's see, at harvest time and one time before that, but I don't remember where it was. I believe in Klamath here.

Q. On the ranch did you see him more than once?

A. I might have, but I didn't see very much of Mr. Barr.

Q. Did you observe any of the crops along the ditch banks where they received ample moisture, the size of the crops? A. Yes.

Q. At what time, do you happen to remember?

A. It would be in July.

Q. What was the size of the crops around the ditch banks, the height of them?

A. Around waist height.

Q. Is that the same time you saw the ten inch wheat crop? A. Same time.

Recross Examination

By Mr. Kester:

Q. The wells you were drilling were for the use of the potato fields, were they not?

A. I don't know.

Q. Were any of them put into use while you were there? A. No.

(Deposition of Clarence F. Enloe.)

Q. You didn't finish your drilling in time to use them that season? A. No.

Mr. Kester: That's all.

Mr. Tonkoff: That's all.

MARY E. NOAKES

a witness produced on behalf of the plaintiff, was examined and testified as follows in answer to questions put to her by the respective attorneys:

Mr. Tonkoff: Mrs. Noakes, would you state your name? A. Mary E. Noakes.

Q. Where do you live?

A. Macdoel, California.

Q. How long have you lived there?

A. Eight years.

Q. What is your husband's occupation?

A. He works for the U. S. Forest Service.

Q. Had he any other occupation in the past?

A. Farming before.

Q. Are you familiar with the Meiss Ranch?

A. Yes.

Q. Showing you Identification 1, can you state whether or not you owned any property in the immediate area of the Meiss Ranch?

A. Yes, we did.

Q. This is the lake (indicating on the map). Where was your property?

A. Its in Sections 12 and 13, and half of Section 6.

Q. Was that west of the lake or east of the lake?

A. East of the lake, its right in there.

(Deposition of Mary E. Noakes.)

Q. Could you draw it in?

A. If I had a section mark I could.

Q. Just indicate it.

A. This is the canal (indicating on the map), and this is where our house set, and we had this and this half section here.

Q. Will you draw it in, just rough there?

A. I think that's right (drawing).

Q. Well, approximately. These two tracks I will mark them N-F, for Noakes Farm. How many acres does that consist of?

A. Approximately 800.

Q. How long did you farm it?

A. We farmed it eight years.

Q. Was that originally part of the Meiss Ranch?

A. Yes.

Q. What did you grow on that farm?

A. Alfalfa, clover, wheat, barley and potatoes, a little rye.

Q. Were you familiar with the growing conditions in 1953? A. Yes, we ran the farm.

Q. What would you say the weather conditions were that year, good or bad?

A. They were good.

Q. Did you have any frost that season in the fall before the crops were harvested?

A. Not until September.

Q. When did the harvest season commence in the locality you farmed, when were the crops ready for harvest? A. About the 20th of August.

(Deposition of Mary E. Noakes.)

Q. Are you familiar with the production per acre in that area? A. On our farm.

Q. Is the type of soil the same as on the Meiss Ranch?

A. No, the ground on the Meiss Ranch is better than our ground.

Q. What was the production of wheat in that vicinity?

Mr. Kester: You mean on her area?

Mr. Tonkoff: In the immediate vicinity.

A. We usually get about 3000 pounds per acre.

Q. Of wheat? A. Yes.

Q. Did you get that much that year?

A. On our good wheat we did.

Q. How much did you get on the other?

A. I would say about 25 sacks.

Q. How many pounds in a sack?

A. 120.

Q. Could you tell us what the barley production was that year per acre?

A. It usually runs about 11½ tons to the acre, and I imagine it was about the same as usual.

Q. And what was the rye?

A. About 15 sacks.

Q. How much does rye weigh a sack?

A. I mean about 1500 pounds.

Q. Per acre? A. Yes.

Q. And what were the oats?

A. We didn't have oats so I don't know.

Q. Did you have to irrigate this property?

A. Yes.

(Deposition of Mary E. Noakes.)

Q. In that area can you grow grain crops without irrigation? A. We never did.

Q. Do you know whether you could?

A. Some people have dry land, but they don't get the yield off of it.

Q. If you don't irrigate what happens?

A. It doesn't produce.

Q. When weeds appear in the crops in that area what do you do? A. Spray them.

Q. If you don't spray what happens?

A. The weeds choke out the grain.

Q. Is it customary to spray for weeds in this area? A. Yes.

Q. How long did you irrigate in '53 during the growing season?

A. As I remember we irrigated all of June and July, the first of August the pumps were turned off.

Q. Was any of the water in the lake available for irrigation?

A. We didn't use the lake, we weren't set up for that irrigation.

Q. Is that water in the lake used for irrigation?

A. Yes.

Q. By whom? A. My father.

Q. Who is your father?

A. J. C. Stevenson.

Q. Do you know when he acquired that property? A. Yes.

Q. When?

A. '42 or 3. It was 1943. He sold it the year before, in '52.

(Deposition of Mary E. Noakes.)

Q. During that time did you see grain crops growing on there? A. Sure.

Q. In good seasons and good crops, what height was the grain just before harvesting?

A. I have seen the rye, on my father's horse it would be as high as the saddle.

Q. This year, 1953, did you happen to go over to the ranch?

A. A couple of times to the ranch house.

Q. Were you there during the harvest time?

A. I was at the house but not in the field.

Q. When you went to the ranch did you notice anything on the road?

A. I saw grain scattered along the road.

Q. Can you tell us the extent, the amount of grain scattered on the road?

A. It was noticeable, but I couldn't say it was an inches only in one place, and that was where they had spilled some.

Q. How far did this spilling of grain extend from the ranch to the highway?

A. All along the road.

Q. How far is the main highway from the building where they loaded the grain?

A. About 5½ miles, I think.

Q. While on the ranch during the summer time did you happen to notice any weeds?

A. Just in one field.

Q. What was the size of that field in acres? Could you approximate it for us?

A. About 200 acres.

(Deposition of Mary E. Noakes.)

Mr. Tonkoff: I think that's all.

Cross Examination

By Mr. Kester:

Q. Mrs. Noakes, did you live on the Meiss Ranch with your father during all the time he was farming it? A. Yes, I did.

Q. You grew up on the place?

A. No, we acquired that after I was grown and married.

Q. And I suppose you were familiar in a general way with the methods your father used?

A. Yes.

Q. Did your father spray for weeds on that ranch?

A. Yes, he did, one time when they got the crops planted late.

Q. Only once then in all the years he sprayed for weeds, is that right? A. Yes.

Q. As I understand, the only place you noticed any sizeable amount of grain on the road was where by some sort of accident a quantity had been dumped out in one place?

A. No, along the edge of the road there was a lot of grain that fall, we all talked about it.

Q. Did you see it being hauled? A. Yes.

Q. They used the same trucks your father did?

A. Hauling part of it, yes.

Q. As I understand it, the place you folks owned in '53 was in 12 and 13, and part of Section 6?

A. That's right.

(Deposition of Mary E. Noakes.)

Q. And your place is set up to operate on a little different basis, on wells and ditch system?

A. Yes.

Q. And you pointed out the soil is somewhat different?

A. Its different from the particular part of the ranch where the lake part is.

Q. But the cultivated part is what is involved in this case, part of the lake bottom. A. Yes.

Q. And this patch of weeds you saw, was that immediately west of the dike?

A. Between two dikes, west of one dike.

Q. West of the big dike? A. Yes.

Q. And as I understand it, you didn't actually go out in the field any time that summer?

A. No.

Q. And all you could see was from the road the two times you went to the ranch house?

A. Yes.

Mr. Tonkoff: Mr. Noakes, would you be sworn?

JAMES H. NOAKES

a witness produced on behalf of the plaintiff, was examined and testified as follows in answer to questions put to him by the respective attorneys:

Mr. Tonkoff: Would you state your full name?

A. James H. Noakes.

Q. Where do you live? A. Macdoel.

Q. How long have you lived there?

A. Nine years, I think it is.

Q. What is your occupation?

(Deposition of James H. Noakes.)

A. Right now I am with the Forest Service.

Q. Have you any other occupation?

A. Farming.

Q. How long have you farmed?

A. About eight years.

Q. What kind of farming did you do?

A. What kind of farming? Diversified.

Q. Grow any grain? A. Yes.

Q. Showing you Identification 1, would you state whether that is about the approximate area of the ranch where it is marked N-F? A. Yes.

Q. How many acres does that consist of?

A. Approximately 800.

Q. What did you grow there?

A. We had potatoes, alfalfa, hay, grain.

Q. What kind of grain?

A. Wheat, barley, rye.

Q. Did you ever grow any oats there?

A. No.

Q. In '53, just what, about what was the weather in the growing season, good, bad or indifferent?

A. It was a good year.

Q. Did you have an early frost that year?

A. No, not that I remember.

Q. What does frost in the early fall do to the crops?

A. It just freezes the kernels so they shrivel up.

Q. Did you have frost early that year, '53?

A. I don't think we did out there.

Q. Is this property on the Meiss Ranch?

A. Yes.

(Deposition of James H. Noakes.)

Q. You had an option to purchase it?

A. Yes.

Q. Who did you secure that option from?

A. Frank Hoffus and Albert Kirschmer.

Q. Did you obtain that option after that ranch was sold to Mr. Kirschmer and Mr. Hoffus?

A. Yes.

Q. Are you familiar with the yield on that property in that vicinity?

A. Which property?

Q. The Meiss Ranch, your ranch, and all in the immediate area?

A. Well, some of the crops.

Q. Are you familiar with wheat? What is the production of wheat per acre, under good growing condition, and good farmer-like cultivation?

A. Well, a good crop of wheat sometimes will go a ton and a half to the acre. Barley about the same, I guess.

Q. And rye?

A. Well, rye, I would say around 1500 to 2000 pounds.

Q. Can you dry farm that property and raise any kind of a crop? A. No.

Q. Is irrigation necessary to produce good crops? A. Yes.

Q. What happens if a crop is not adequately irrigated? A. It just burns up.

Q. What do you do if weeds appear in the crop?

A. Well, usually they spray.

Q. Is that a custom in this area? A. Yes.

(Deposition of James H. Noakes.)

Q. And if you don't spray what effect do the weeds have on growing crops?

A. They just get ahead of the grain and choke it out.

Q. If the field is infested sufficiently will the weeds totally destroy the crop?

A. Yes, they will I guess if you let it go.

Q. Do you know whether or not the lake water was used for irrigation? A. Yes.

Q. Do you remember whether or not there was an abundance of water in '53?

A. Yes, there was.

Q. When does the harvesting season generally start under usual conditions?

A. Oh, around the middle of August.

Q. Did it start the middle of August in '53?

A. In '53?

Q. That was the year Mr. Barr was on the property.

A. Its about the same every year I guess.

Q. Did you have occasion to go out there during harvest time? A. No, I didn't.

Q. Did you observe any grain on the road leading up to the Meiss Ranch?

A. Yes, there was.

Q. Can you explain the extent of the amount of grain on the road?

A. I don't know how much there was, it was noticeable all right, how much there was would be kind of hard to tell.

(Deposition of James H. Noakes.)

Q. Was it more than usual in hauling grain from a ranch to the warehouse?

A. In one spot there was, where a tail gate or something had come open.

Q. How much grain was on the ground in that particular spot, can you describe it in inches?

A. Possibly an inch, something like that.

Q. Over what portion of the road did it extend?

A. Lengthwise, right in the middle of the road. I imagine a tail gate had come open, or something.

Q. You don't know of your own knowledge what happened? A. No, I don't.

Q. Was grain noticeable from the Meiss Ranch to the highway?

A. There was a little grain along the edges of the road.

Q. How far is the Meiss Ranch from the highway? A. The highway?

Q. The paved portion of the highway where you go into town.

A. Five, six miles, five and a half.

Q. Did you happen to be out on the ranch during harvest time? A. No.

Q. Did you observe the ranch, concerning its conditions and weeds?

A. This one spot, one piece of ground was in weeds.

Q. Can you approximate how many acres?

A. Oh, 150, 200 acres, I would say.

Q. From what you observed could that be harvested? A. No.

(Deposition of James H. Noakes.)

Q. Did you notice any of the property, whether or not it was plowed, if you remember?

Mr. Kester: Maybe you better tell him what time of year.

Mr. Tonkoff: Just before harvest, several weeks before harvest.

A. No, I wasn't up there very much.

Mr. Tonkoff: That's all.

Cross Examination

By Mr. Kester:

Q. Mr. Noakes, do you actually remember being on the Meiss Ranch at all that summer?

A. Not particularly, I don't know, I was by there on the road.

Q. Aside from just going on the road from the ranch, you weren't actually on the place at all?

A. No.

Q. The road to the ranch house goes along the southerly edge of the ranch? A. Yes.

Q. You can't see the larger part of the ranch from there? A. No.

Q. And the only part you actually noticed was this weed patch?

A. Yes. I guess that's half a mile off the road.

Q. And that's immediately west of the big dike?

A. Yes.

Q. With respect to the grain you saw on the ground, you would normally expect to find it where a tail gate or something came out?

(Deposition of James H. Noakes.)

A. As I remember, I didn't pay too much attention.

Q. And at that point it was possibly an inch deep? A. Yes.

Q. And over what length would that extend?

A. Oh, I don't know, maybe 100 yards from the gate.

Q. That was where they just left the ranch?

A. Yes.

Q. And they stopped after about a hundred yards? A. Yes.

Q. Aside from that there wasn't any more grain than you would normally expect to find from hauling operations?

A. There was quite a bit all right.

Q. There is always some leakage when you haul grain in farm trucks, isn't there?

A. Not necessarily if a fellow is careful, don't drive too fast.

Q. But the only place there was any substantial amount was this one place about 100 yards outside the gate? A. Well, I guess so.

Q. These estimates you gave as to crop production, those would be good crops you speak of, wouldn't they? A. Yes.

Q. And good land and good growing conditions, and everything as favorable as possible?

A. Yes.

Q. Have you farmed yourself any place than this 800 acres you had an option to buy?

A. No.

(Deposition of James H. Noakes.)

Q. That's the only place you have done any farming? A. Yes.

Q. How long were you on that 800 patch yourself? A. Eight years, I think.

Q. And you started that in from raw land yourself? A. Yes.

Q. So that you had,—did you have to clear sage brush? A. Cleared sage brush, yes.

Q. And did you level it and ditch it?

A. Yes. We didn't have it leveled to grade, but had it so we could irrigate it.

Q. In order to irrigate you have to have the land more or less level so you can put the water where you want it?

A. Yes, so you can control it.

Q. If you dumped the water out without the land being prepared you wouldn't get much good from it, it would go to the low spots, you wouldn't get much good from it?

A. That's about the way it would be.

Q. So in order to do a good job you have to level the land, then ditch it, to take the water where you want it? A. Yes.

Q. And that's quite an operation when you are starting in on raw land? A. Yes.

Q. Takes quite a bit of time to work it out just the way you want it for best irrigation?

A. Yes.

Q. On this spraying for weeds, isn't it a fact if the weeds get a head start on the grain there is a

Deposition of James H. Noakes.)

Q. Any real danger if you put enough spray on to kill the weeds you kill the grain? A. No.

Q. Its not dangerous? A. No.

Q. You don't have to worry about that?

A. No.

Q. What do you use for spray?

A. Kind of a fertilizer, I don't know the name of it, its nitrogen.

Q. That's what you use for weeds?

A. Yes.

Q. It don't hurt the grain at all?

A. The stuff they use doesn't, they have developed it so it works on the wide leaves and won't work on the narrow.

Q. That's the way it worked in '53?

A. Yes.

Q. And it wouldn't hurt the grain crop?

A. No.

Q. Did you spray? A. No.

Q. Have you ever sprayed on your place?

A. No.

Q. You have never had any personal experience? A. No.

Mr. Kester: That's all.

Redirect Examination

By Mr. Tonkoff:

Q. What was the type of soil the Meiss Ranch had?

A. There were several different types on the ranch.

(Deposition of James H. Noakes.)

Q. Was it good, bad or indifferent?

A. Some of that is as good as you can find, and some isn't so good.

Q. What does the majority of the ranch consist of, lake bottom or rocky?

A. The majority of the ranch would be lake bottom.

Q. What is lake bottom soil, good or bad?

A. Lake bottom, you say?

Q. Yes. A. Its good.

Q. Does it produce better crops than other types of soil? A. Yes.

Q. Have you ever observed the height of the grain in that area in other years?

A. Yes, I have.

Q. What is the ordinary height of the grain?

A. The barley, seems to me, would be about 3, 3½ feet tall.

Q. What about wheat?

A. Some of it would be almost up to your shoulders in places.

Q. And the rye?

A. One place where I know the rye was as high as a man's head.

Q. And oats?

A. Oats, they were about 3 feet tall, I suppose.

Q. Unless you farm the land in a farmerlike manner in this area, can you produce those crops?

A. No, I wouldn't think you could any place.

Mr. Tonkoff: That's all.

(Deposition of James H. Noakes.)

Recross Examination

By Mr. Kester:

Q. What years are you speaking of when the crops were as high as a man's head?

A. I think that was '47, '48, somewhere in there.

Q. And on what land are you speaking of?

A. That was down there on the lake bottom land.

Q. Aside from that extremely good period in '47 and 8, you haven't seen them that good since? That was an unusual year, wasn't it?

A. Well, now, I don't know whether it was unusual or not.

Q. Were the crops that way all over the entire ranch, or better on some spots than others?

A. No, it seems they were all good.

Q. I believe you said before the nature of the soil is different on different parts of the ranch?

A. Yes.

Q. You get on the bottom of the lake you get a lot more weeds than you get up around the edge where its dobe? A. Yes.

Q. Isn't it a fact that on the bottom land you have quite a problem keeping the water out of it?

A. You have to pump.

Q. The reason for the pump is to get rid of the surplus water, too much water isn't good for the crops? A. No, it isn't.

Q. And close to the dike you get a lot of sub-irrigation, and it keeps the bottom land next to it pretty moist, doesn't it?

(Deposition of James H. Noakes.)

A. Well, now, I don't know.

Q. Have you had any personal experience with the rest of the ranch at all? A. No.

Mr. Kester: That's all.

Mr. Tonkoff: That's all.

JOHN RICHARD RATLIFF, JR.

a witness produced on behalf of the plaintiff, was examined and testified as follows in answer to questions put to him by the respective attorneys:

Mr. Tonkoff: Will you state your full name?

A. John Richard Ratliff, Jr.

Q. And your age? A. 37.

Q. What is your occupation?

A. I'm a farmer.

Q. How long have you farmed?

A. Well, I was born on a ranch and been farming on my own since 1940, and farmed with my dad before that.

Q. In what kind of farming are you principally engaged?

A. Stock, grain, clover, alfalfa.

Q. Where has this been mostly done, what area?

A. Merrill and Tulelake.

Q. Are you familiar with the Meiss Ranch?

A. Yes.

Q. How far from Tulelake is the Meiss Ranch, approximately?

A. Approximately 45 miles.

Q. In what direction?

A. It would be pretty near straight west.

(Deposition of John Richard Ratliff, Jr.)

Q. Did you happen to be on the Meiss Ranch in '53? A. Yes.

Q. What were you doing there?

A. I had a piece of ground rented and was raising potatoes.

Q. How many acres?

A. 100 on my own and 100 for another man.

Q. The total amount planted was 200 acres?

A. Yes.

Q. On what portion of the ranch were the potatoes, north, south, east or west?

A. It would be on the south of the ranch.

Q. How much of your time did you spend over here?

A. I went over there and started to work around the 1st of April, and was there practically all the time until the 1st of November.

Q. In 1953? A. Yes.

Q. Did you happen to observe the crops growing here the first part of June, grain crops?

A. Well, yes, most of it.

Q. What was the condition of it the fore part of June?

A. I thought it looked pretty good.

Q. Considering other crops of a similar nature?

A. Yes.

Q. Could you see anything wrong with it, lack of water, a decided lack of irrigation?

A. Not that time.

Q. Did you notice the soil in relation to moisture

(Deposition of John Richard Ratliff, Jr.)

the latter part of June and first part of July, whether or not it was getting dry?

A. The grain around the potato field showed lack of moisture, the part I was in most of the time.

Q. Did you go over the ranch, any part of it?

A. All except the north side I was around pretty much.

Q. What would you estimate was the grain planting in that area?

A. Acreage, you mean?

Q. Approximately how much grain?

A. Well, I would say somewhere between 750 and 1000 acres, close to the spuds.

Q. Did you notice any change in the condition of the crop as the season went on?

A. Well, there was a field of wheat practically dried up, cracked open.

Q. Cracked open? What do you refer to?

A. The ground cracked open. The barley against the potatoes wasn't bad, but that place was a little higher than the rest of it, it was burning by the 1st of July.

Q. You mean 1000 acres was the entire crop?

A. No, the grain crop around where I was in there practically every day.

Q. About how wide were those cracks the latter part of July, first of August, how wide were they?

A. Anywhere from a half inch to an inch and a half.

Q. How long were they, just approximately?

Deposition of John Richard Ratliff, Jr.)

A. They might vary from 1 foot long to 10 feet long.

Q. Were they numerous on the ground?

A. Running in all directions.

Q. Did the crop show the effects of lack of moisture?

A. By the 15th of July they were showing lots of effect from the lack of moisture.

Q. And is it possible in that area to grow grain without irrigation, in your experience, successfully?

A. I would say it would be possible to grow a crop of grain without irrigation, but not practical.

Q. Was there ample water for irrigation?

A. Yes.

Q. How do you irrigate that property, generally?

A. There was some of it should have been, could have been sprinkled.

Q. Is there a sprinkling irrigation on that ranch? A. Yes.

Q. Was it used by any one that summer?

A. Yes, it was used by some one by the name of Jeff, but just a day or two.

Q. What time of the year was that, what month?

A. It was done in the first half of July.

Q. Where was it used, on the grain crop?

A. It was used, part of it used on the grain crop. I guess all the sprinkling done that I remember of at that time was used on the grain crop.

Q. How much of a sprinkling system have they?

A. I think half a mile of it.

(Deposition of John Richard Ratliff, Jr.)

Q. Now, Mr. Ratliff, while you were there did you notice any weeds appear in the crop?

A. One field was completely taken.

Q. Where was that?

A. Immediately east of my potato field, in the southeast corner of the ranch.

Q. How many acres in that field?

A. Somewhere between 3 and 500 hundred, I guess.

Q. Was a part of that field later plowed up?

A. Part of it, or all of it, I wouldn't say for sure.

Q. Plowed up? A. Plowed up.

Q. Was any spraying done there for the weeds?

A. None that I know of.

Q. What is the customary practice here when weeds appear in grain crops?

A. The customary practice has been to spray with 2-4D.

Q. And that kills the weed growth?

A. Practically all the weeds.

Q. That was not used on this particular tract?

A. Not that I know of.

Q. What occurs if you don't destroy the weeds?

A. Depends on how bad the weeds are. If they choke the grain out its impossible to harvest.

Q. What was the situation in this area?

A. I think the weeds practically took the grain, I don't think there was any left.

Q. You say the weeds covered an area of 3 to 5 hundred acres?

A. That field where the weeds was, I was never

Deposition of John Richard Ratliff, Jr.)

n over the field but along two sides of the field, and from there I could see the majority of that field.

Q. What would you say was the total amount of acreage planted to grain on that ranch? I assume you would have to approximate that.

A. Somewhere between 3 and 4 hundred acres, I would judge.

Q. Your own estimation?

A. My own estimation.

Q. Are you familiar with the type of soil on that ranch? A. Yes.

Q. What kind of soil is it, as to fertility?

A. The majority of the ground on that ranch is probably as rich as anywhere in the country.

Q. Do you know what it is capable of producing, or what is the production in that area of grain per pound, say of wheat?

A. Taking into consideration the ground where the wheat was planted that year, I would say 1500, 2000 pounds of wheat.

Q. What about barley?

A. The barley as a whole should have made 11½ tons to the acre.

Q. Three thousand pounds. What about oats?

A. Oats should have been pretty close to 2500.

Q. And rye? A. Rye 1500.

Q. Did you notice the effect on the crops before harvest due to the lack of moisture, lack of irrigation? What effect it had on the crop?

A. I happened to be over there when they was threshing, I think the wheat crop was practically a

(Deposition of John Richard Rathiff, Jr.)

loss. There might have been another cause than the lack of water, but I would say lack of water was the main cause.

Q. What other causes do you have in mind?

A. It could have been a little frost, but I don't think so.

Q. What was the weather conditions in '53?

A. To the best of my knowledge I didn't have any frost in my potatoes from, oh, around the 25th of June somewhere until the 15th or 20th of September.

Q. How does that compare with other seasons?

A. About normal.

Q. Was that season any longer, any warmer in the summer time? When were the crops ready for harvesting, what time of year?

Mr. Kester: What crops are you speaking of?

Mr. Tonkoff: Grain crops.

A. I believe there could have been some grain harvested by the 15th of August.

Q. Do you know when the harvest commenced, to the best of your recollection?

A. It was after the 1st of September, I am sure.

Q. What would you say was the growing conditions that year, good or bad?

A. To my own judgment I thought it was a pretty fair growing season.

Q. Did you happen to see them harvest the grain that year?

A. I wasn't out where they combined, no.

(Deposition of John Richard Ratliff, Jr.)

Q. Did you go over the ground after they combined?
A. No.

Q. Did you see the crops delivered?

A. I seen the trucks go by the potato field when we was harvesting.

Q. Did you notice any grain on the road between the field and Macdoel?
A. Yes.

Q. Was that more than the usual amount lost by delivery?

A. Let's put it this way, it was more than we would have lost.

Q. Can you account for the grain on the road, how it happened out there?

A. Lack of tarp on top of the load.

Q. Is it customary to use tarps in delivering grain?

A. The majority of the people do.

Q. What's the purpose?

A. Keeps the grain from blowing out.

Q. How often did you see Mr. Barr at the ranch that year, on how many occasions?

A. Three, possibly four, times. He was there when we planted in the spring, he was there at harvest, and once or twice I saw him through the summer.

Q. How long periods would he remain on the ranch?

A. I couldn't definitely say how long he would stay, I know I would see him around, two or three days, through harvest and in the spring, he wasn't there the greater majority of the time.

(Deposition of John Richard Ratliff, Jr.)

Q. You saw the weeds on the ground by the potato patch. In your opinion as a farmer, grain grower in this area, would you say that work was done in accordance with the farming standards followed in this community?

Mr. Kester: I object to the form of the question, it asks for the conclusion of the witness, there has been no basis for his qualification, and its not a proper subject for expert testimony.

Mr. Tonkoff: How long did you say you have been growing rye, wheat, oats and barley in this country?

A. As I said, I was born in this country, was raised on a ranch, all my life I've farmed with my dad from the time I was big enough to start farming. He in turn was raised here.

Q. Are you familiar with the farming practice and standards in this community?

A. I think so.

Q. With that in mind, from what you observed there, what farming that was done on that 1000 acres of wheat, would you say proper farming standards were followed?

Mr. Kester: Same objection.

Mr. Tonkoff: On the thousand acres?

A. That included barley and rye.

Q. Would you say that proper farming standards were applied to the farming here, were used in the growing and cultivation of those crops?

A. I wouldn't say they were.

Deposition of John Richard Ratliff, Jr.)

Q. Would you say it was done in a good farmerlike manner, the cultivation of the crops?

A. The cultivation I can't say.

Q. I mean growing, irrigating, spraying?

A. There was practically no irrigating at all one, there was no spraying done, and there was definite signs the grain should have been irrigated, and one piece especially should have been sprayed.

Q. Would you say the growing of that crop was done in a good farmerlike manner?

A. I can't say it was.

Q. Would you say it was done in an extremely bad manner?

Mr. Kester: Same objection.

Mr. Tonkoff: Would you say it was neglected?

A. It was neglected, that right.

Q. Did Mr. Barr and his attorney, Mr. Kester, ever talk to you concerning your testimony?

A. I can't say who the attorney was, Mr. Barr did in a restaurant.

Mr. Kester: I talked to you, yes.

Mr. Tonkoff: How long ago?

A. It was last May or June, I believe.

Q. What did Mr. Barr have to say about it?

A. He asked me a bunch of questions very similar to what you have asked me this afternoon.

Q. What did you tell him?

A. To the best of my knowledge about the same as I have told you.

Q. Did he make any response to it?

A. No.

(Deposition of John Richard Ratliff, Jr.)

Q. Was there an abundance of water to irrigate that year? A. Definitely so.

Q. How many wells are on that ranch?

A. There is 3 wells on the ranch that is set up with pumps, another its possible to use, and an abundance of water in the lake.

Q. Is the level of the water in the lake above the farming area?

A. A big portion of it was at that time.

Q. Have you seen crops grown on that area before when you have been on the ranch?

A. I was never close to crops on the ranch before I had a small patch of spuds on it year before last. I wasn't there as much after that year.

Q. What was the height of the grain the year before,—barley, rye, oats?

A. There was barley in there just practically as high as my shoulders at the time it headed out.

Q. Was there any difference in the height of the grain with the year 1953?

A. Yes, it was never as good that year as the year before.

Q. Can you give me any explanation why the grain wasn't as high as it was the year before?

A. Well, some of that grain was pretty near that high that same year, but the short grain was on ground that had a little slope to it, it would go right back to the lack of moisture.

Q. Where did you see the high grain that year, 1953? A. In the lower ground.

Q. Did the lower ground get more water?

Deposition of John Richard Ratliff, Jr.)

A. Your water table is in low ground.

Q. Was there ample water to irrigate the higher ground? A. Yes.

Q. How much of the time did you spend on the ranch that year?

A. I would say I spent close to 10 hours a day, better than 6 days a week.

Mr. Tonkoff: That's all.

Cross Examination

By Mr. Kester:

Q. Mr. Ratliff, your interest was in the potato ground and not the grain ground, except as you might notice? A. That's right.

Q. You had about 200 acres of potatoes?

A. That's right.

Q. And the time you were on the place was almost entirely within those 200 acres?

A. Taking care of my potatoes involved considerable work and passage around different parts of the ranch, the whole south half of the ranch.

Q. Was there any grain immediately next to your potato field? A. Yes.

Q. Was that where this wheat patch was you spoke of? A. Yes.

Q. Was there any other grain between your field and the main dike east of you besides this wheat patch?

A. There was the one big field there. No, I think it was partially but in two by the drain ditch, but not entirely.

(Deposition of John Richard Ratliff, Jr.)

Q. That's the only area that had any wheat that you noticed?

A. So far as I noticed. I can't make any statement about the north half of the ranch.

Q. That field immediately east of you is low, isn't it? Bottom land? About the lowest part of the ranch?

A. I couldn't say as far as a survey's standpoint, I know its the first to dry up.

Q. That was kind of a wet spring?

A. Definitely so.

Q. Rained all of May and half of June?

A. The first week in June.

Q. And practically all of May? A. Yes.

Q. So it was hard to get out and work in the field, it was pretty muddy? A. Yes.

Q. When the fields are pretty wet doesn't that tend to drown out the barley, for instance?

A. Yes.

Q. In your opinion, one reason the weeds got started was because the water drowned out the barley, isn't it?

A. I don't hardly believe so. In the first place, I don't think too much of that field was barley, the big majority of it was rye. Some of it was barley.

Q. Didn't you tell me before the weed patch got started because the water drowned out the barley?

A. I don't believe I did. I might have. I made one statement to you before but I think it was pertaining to my potato patch.

Deposition of John Richard Ratliff, Jr.)

Q. Your spuds drowned out, didn't they?

A. Yes.

Q. So you didn't get any potato crop and that was too much water? A. Yes.

Q. You have to get just the right amount of water, not too much, not too little,—it requires judgment and experience to get the right amount?

A. Mostly judgment and experience.

Q. On grain, for instance, if you irrigate in the summer time it would tend to start a re-growth?

A. Not if its at the right time.

Q. The question of the right time involves some experience and judgment? A. That's right.

Q. If its too late, you'd get a re-growth?

A. Yes.

Q. And that would tend to delay the harvest?

A. Yes.

Q. And tend to get caught by an early frost?

A. That's right.

Q. And you have to make a pretty fine decision as to when to irrigate?

A. Over a period of 10 days or 2 weeks.

Q. There was some trouble that year, didn't you have to hire some airplanes to circle around to keep the frost off your potatoes?

A. Yes, there was a weekend on, around the 26th of August, I definitely remember it, but I wouldn't have needed it but I was afraid I would, it was on the border line.

Q. You weren't around there from the 1st of

(Deposition of John Richard Ratliff, Jr.)

September until you started your potato harvest in October?

A. Yes, I was there pretty much until the 20th of September, there was probably a period of a week or 10 days, maybe 2 weeks, from the 20th of September until we started harvest.

Q. When did you start harvesting potatoes?

A. I think I moved the machinery over there between the 12th and 14th of October.

Q. Don't you remember telling me you weren't there from the 1st of September to harvest?

A. No, for the simple reason that from the time we quit irrigating until harvest I had about 2 weeks work.

Q. When did you quit irrigating the potatoes?

A. Oh, around, I believe we was finishing up irrigating the morning we had the plane, about the 20th of August.

Q. Then you had a couple of weeks work after that?

A. There was probably two days from irrigating until we started work on the ditches, which would probably have been 5, 6, 7 days, so there might have been a week. Then between the 25th or 6th of August I wasn't there, and then after the 20th of September.

Q. You weren't there during the grain harvest?

A. Part of the grain harvest was going on then, yes.

Q. The grain harvest was pretty well over in October, wasn't it?

(Deposition of John Richard Ratliff, Jr.)

A. They were still harvesting grain.

Q. Did you say there was no spraying done at all?

A. No spraying in the fields, to my knowledge.

Q. There was spraying on the ditch bank?

A. On the ditch bank, yes.

Q. Potatoes are kind of sensitive to that spray, aren't they? A. Yes.

Q. If some of that spray had dropped over on your potatoes it would have killed them?

A. Yes.

Q. And you would have had quite a holler, wouldn't you? A. I would, yes.

Q. Isn't it a fact that when to spray and how much to spray requires some skill and judgment?

A. Not necessarily on the part of the farmer.

Q. Does that spray bother grain crops at all?

A. Not that I know of.

Q. Did you ever spray grain fields?

A. Yes.

Q. Isn't there a chance if its the wrong time it might kill it?

A. It might if the grain was just barely coming up.

Q. So in your opinion no matter how much you spray after the grain got started—

A. (Interrupting) But the man who sells the spray will give you very definite information how much to use and when to put it on.

Q. You would rely on the judgment of a commercial spraying man.

(Deposition of John Richard Ratliff, Jr.)

A. Or an entomologist, a man who has worked with chemicals.

Q. And if he told you to spray for weeks you would rely on his opinion?

A. I would say so.

Q. When did you first go on the place in the season of '53?

A. Somewhere around the 20th of April.

Q. Had some of the planting already been done when you got there, grain planting?

A. Some rye planting, and possibly some wheat.

Q. You spoke of an area of higher ground west of the main part of the lake bed, do you happen to know how much cultivation that had prior to planting? A. No, I don't.

Q. It would be good practice to cultivate ground before planting grain? A. I would think so.

Q. And if the grain was planted without cultivating, you wouldn't expect much, would you?

A. No.

Mr. Kester: I think that's all.

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Ratliff, did you plant potatoes when they were planting grain? A. Yes.

Q. How wet was it then? A. Pretty wet.

Q. Can you plant in this part of the country when its wet? A. Yes.

Q. Does the moisture keep people from planting?

(Deposition of John Richard Ratliff, Jr.)

A. Yes, it would, but it has to be awful wet.

Q. Was it wet enough in '53 to delay planting?

A. Not very much, no. I prepared the ground and planted 200 acres of spuds from somewhere around the 25th of April to the 7th of June, and there was very few days we didn't work.

Q. Was there any delay in planting due to moisture in '53? A. A little, yes.

Q. How many days, approximately?

A. During the time we was working there we missed working 3 or 4 half days, and either 2 or 3 full days.

Q. Did the moisture delay the planting of the wheat crop that year?

A. It shouldn't have delayed it any longer than it did us on our spuds.

Q. Was there any damage to the crop due to the wetness of the planting season?

A. Very little, there may have been a few little spot holes, small areas, an acre or two.

Q. Do you consider that negligible?

A. On a big acreage, yes.

Q. In determining when or when not to irrigate, does it require the grower's presence on the property to make that determination?

A. It would require my presence if I was doing it.

Q. Was Mr. Barr there enough to determine when to irrigate?

Mr. Kester: In the first place he said he wasn't there enough to know, it calls for a conclusion.

(Deposition of John Richard Ratiff, Jr.)

Mr. Tonkoff: You were there enough to know whether he was there enough.

A. I believe Clay was down there about that time, as near as I can remember.

Q. When, what time?

A. The latter part of June.

Q. Did he irrigate at that time? A. No.

Q. Was any damage done to the crop by reason of this frost that appeared in August?

A. To the best of my knowledge there was no frost. But I took precautions against it.

Q. Now, were the weeds killed on the ditch bank where it was sprayed? A. Partially.

Q. How far was that ditch bank from your potato field?

A. The ditch bank I noticed had been sprayed was about half a mile from the potato patch.

Q. Were there weeds between the ditch bank and the potato field?

A. It was south of the ditch bank.

Q. Did the spray approach anywhere near the potato patch? A. With the plane? No.

Q. Could he have passed without injury to the potatoes?

A. Yes, they spray that way all the time.

Q. How close can he get to the potatoes spraying by plane without injury?

A. They spray within 200 feet all the time.

Q. How far was the ditch bank that was sprayed?

A. Approximately half a mile. The ditch bank

Deposition of John Richard Ratliff, Jr.)

noticed that had been sprayed run along the north side of the field that had the weeds in it, and the north side of the field that had the potatoes in it.

Q. How far did the weeds start north of the potatoes. You say the weed bank was east of the potatoes. Spraying those weeds would not have injured the potatoes in any manner? A. No.

Q. I think you said you wouldn't use your own judgment in using spray? Why?

A. For the simple reason there is so much change in developing these chemicals you can't keep up with it.

Q. Whose judgment would you rely on?

A. Somebody that handles them, or at least has the latest information about it.

Q. Is that information available in this district?

A. Yes.

Q. Where do you get it?

A. One fellow in Tulelake, Green Spray Service, he puts out very reliable information. And a dealer in Merrill, Walker Brothers, and there are probably one or two in Klamath Falls.

Q. Does the Department of Agriculture put out that information? A. Yes.

Q. Do you have that here?

A. At the County Agent's office.

Q. Do you have a Soil Conservation office here?

A. Yes.

Q. Do they put out information in that respect?

A. As to their own experiments.

(Deposition of John Richard Ratliff, Jr.)

Q. How about the Reclamation Service?

A. I don't know.

Mr. Kester: Can you spray while its raining?

Mr. Tonkoff: When did the rain cease that summer?

A. I don't know, we finished planting potatoes while it was raining, after the 7th of June.

Q. When did you observe the weeds, how long after that? A. About that same time.

Q. Was the wheat such that you could have sprayed after that?

A. I would say you couldn't spray after the 6th or 7th of June.

Mr. Tonkoff: That's all.

Mr. Kester: That's all.

Notary Public's Certificate attached.

[Endorsed]: No. 15022. United States Court of Appeals for the Ninth Circuit. J. P. Tonkoff, individually and as trustee, Appellant, vs. Clay Barr and Betty Barr, husband and wife, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: February 3, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15022

J. P. TONKOFF, individually and J. P. Tonkoff,
as Trustee of E. J. Welch and Viola Welch,
husband and wife, Roland P. Charpentier and
Effie Charpentier, husband and wife, and John
W. Cramer, Appellant,

vs.

CLAY BARR and BETTY BARR, husband and
wife, Appellees.

DESIGNATION OF STATEMENT OF POINTS
AND RECORD ON APPEAL

To: Honorable Paul P. O'Brien, Clerk, United
States Court of Appeals, Ninth Circuit; and
McGuire, Shields, Morrison & Bailey, and Ran-
dall B. Kester, Attorneys for Appellees:

The appellant above named adopts the statement
of points and designation of contents of record on
appeal which are contained in the typewritten tran-
script of the record forwarded to the Clerk of the
United States Court of Appeals for the Ninth Cir-
cuit, as appellant's statement of points and designa-
tion of record on appeal to be printed in accordance
with Rule 17 of the Rules of the United States
Court of Appeals for the Ninth Circuit.

Dated this 6th day of February, 1956.

/s/ FERTIG & COLOMBO,

/s/ TONKOFF, HOLST & HOPP,

/s/ By W. B. HOLST,

Attorneys for Appellant

[Endorsed]: Filed February 8, 1956. Paul P.
O'Brien, Clerk.